(22,293)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 119.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON

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1 & 2 In the Supreme Court of the United States.

Milwaukee Case, No. 6967.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON, Defendant in Error.

Appeal from the Supreme Court of the State of Oregon.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff in Error;

A. M. Crawford, Attorney General, Clyde B. Aitchison, and Giltner & Sewall, for Defendant in Error.

3 & 4 *Transcript.*

Milwaukee Case. Case No. 6967, Drawer No. 652.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,

vs.

RAILROAD COMMISSION OF OREGON, Defendant.

Appeal from the Honorable Circuit Court of Marion County.

Hon. Wm. Galloway, Judge.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff and Appellant.

A. M. Crawford, Attorney General; Clyde B. Aitchison and Giltner & Sewall, Attorneys for Defendant and Respondent.

5 Be it remembered, that heretofore, on the 27th day of February, 1908, there was filed in the office of the clerk of the circuit court of the State of Oregon in and for the County of Marion, a complaint in words and figures as follows:

6 In the Circuit Court of the State of Oregon for the County of Marion.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,

vs.

RAILROAD COMMISSION OF OREGON, Defendant.

Complaint.

Comes now the plaintiff above named and for cause of suit against the above named defendant alleges:

I.

That plaintiff is now and at all times since the 28th day of October, 1907, hereinafter referred to, has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having its principal office and place of business at the City of Portland, Oregon, and during all of said times has been and is now engaged in operating street railways within the said City of Portland and railroads without the said City of Portland in Multnomah and Clackamas Counties, State of Oregon, and during all of said time has been and is now engaged in the enterprise and business of transportation of passengers as a common carrier over lines of railway with termini as follows:

(*a*) From the City of Portland, in the County of Multnomah, State of Oregon, in a general southeasterly direction to section 3 township 4 south of range 4 east of Willamette meridian in the County of Clackamas in said state, which line is known and hereinafter referred to as the "Springwater Division."

(*b*) From the said City of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Wilamette River about one mile south of Oregon City in said County of Clackamas, which line is known and hereinafter referred to as the "Oregon City Division."

(*c*) From the said City of Portland in a general easterly and northeasterly direction to and through the said village of Lents, to Lents Junction on the line of railway first above mentioned,
7 in said County of Multnomah, which line is known and hereinafter referred to as the "Mt. Scott Division."

(*d*) From a point on the line of railway first above mentioned near the town of Cedarville in section 17 township 1 south of range 3 east of Willamette meridian in a general northerly and northeasterly direction to and through the village of Troutdale in said County of Multnomah to the Columbia River opposite Lady's Island, which line is known and herein referred to as the "Troutdale Division."

II.

That by reason of the facts, circumstances and conditions hereinafter fully set forth, plaintiff has established certain reasonable

rates of fare for the transportation of persons traveling as passengers upon its said lines of railway and between different points on its said railways and its said terminus at First and Alder Streets in said City of Portland and between Golf Junction to the places and points named below, the following rates, fares and charges, the distances being as set forth below.

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36	miles	5 cents.
Lambert	5.93	"	10 "
Knight	6.29	"	10 "
Hendee	6.44	"	10 "
Milwaukee	6.71	"	10 "
Island	7.05	"	10 "
Milwaukee Heights	7.70	"	15 "
Courtney	8.30	"	15 "
Oak Grove	8.48	"	15 "
Center	8.68	"	15 "
Risley	9.26	"	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69	miles	5 cents.
Lents	7.69	"	5 "
Lents Junction	8.31	"	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35	miles	5 cents.
Nickum	6.51	"	5 "
Kerrigan	7.26	"	10 "
Bell	8.51	"	10 "
Kendall	9.32	"	10 "
Lents Junction	10.71	"	10 "
Gilbert	11.65	"	10 "
Gates	12.38	"	10 "
Wilson	13.00	"	15 "
Sycamore	13.48	"	15 "
Jenne	14.43	"	15 "

8 Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5 cents.
Knight	.93	"	5 "
Hendee	1.08	"	5 "
Milwaukee	1.35	"	5 "
Island	1.69	"	5 "
Milwaukee Heights	2.34	"	10 "
Courtney	2.94	"	10 "
Oak Grove	3.12	"	10 "
Center	3.32	"	10 "
Risley	3.90	"	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 cents.
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

III.

That plaintiff's "Oregon City Division" extends from its terminus on First and Alder Streets in Portland to and through Golf Junction on the southern boundary line of Portland and thence in a general southerly direction to Oregon City and Canemah; and that plaintiff's "Springwater Division" extends from said terminus in Portland to and through said Golf Junction and thence in a general easterly direction to and through Lents Junction and thence in a general southeasterly direction to Cazadero; and that plaintiff's "Mt. Scott Division" extends from said terminus in Portland in a general easterly and northeasterly direction, not passing through or near said Golf Junction, to and through Lents and thence in the same direction to said Lents Junction.

IV.

That plaintiff operates its cars of and from all of its said divisions within the corporate limits of the City of Portland under franchises by the terms and provisions of which it is prohibited from charging any passenger more than five cents for any one continuous ride in any one general direction on any of said cars; and that as said City of Portland has a population exceeding 50,000 inhabitants, this plaintiff is also prohibited by Section 2096 of Bellinger and
9 Cotton's Annotated Codes and Statutes of Oregon from Charging any passenger more than five cents for a continuous ride in one general direction in said city.

V.

That plaintiff charges a fare of 25¢ for a ride from its said terminus in Portland to Oregon City, a distance of 14.47 miles and that said fare is approximately at the rate of 2 cents per mile.

VI.

That because of the facts set forth in paragraph IV of this complaint, plaintiff cannot, on or for any ride on its "Oregon City Division," charge at the rate of 2 cents per mile or charge more than five cents in all for the 5.36 miles from its said terminus on First and

Alder Streets and Golf Junction, as all of said 5.36 miles is within the said City of Portland; and that because it is not practical or convenient to collect fares on said Division other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed the remaining 20 cents of the 25 cent fare from Portland to Oregon City by dividing the remaining 9.11 miles of the total mileage between said cities into four districts and applying to all points within each district a group rate of five cents more than the fare to points within the next district on the north, thus: (*a*) The first district includes Lambert, Knight, Hendee, Milwaukee and Island and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 10 cents and from Golf Junction five cents less; (*b*) the second district includes Milwaukee Heights, Courtney, Oak Grove, Center and Risley and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; (*c*) the third district includes all stations from and including Concord to and including Clackamas Bridge and the group rate applied to said district and the fare for and rate to each station in said district from Portland is twenty cents and from Golf Junction five cents less; and (*d*) the fourth district includes Park Place and Oregon City and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 25 cents and from Golf Junction five cents less.

VII.

That though the fare charged by plaintiff for one ride from Portland to the places included in said second district on said "Oregon City Division" is fifteen cents, plaintiff has established commutation rates to said places and sells commutation books to each of said places, containing twenty coupons, each of which entitles the bearer to a ride to or from Portland, at the following rates: $1.50 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center and $2.00 for Risley.

VIII.

That Golf Junction on the southern boundary of Portland is the junction of plaintiff's "Oregon City Division" and "Springwater Divisions," and from that point to its terminus on First and Alder Streets in Portland, plaintiff's cars of and from both divisions run over the same tracks; and that plaintiff's "Oregon City Division" extends south from Golf Junction, and on trips to or in the direction of Oregon City its cars thereon are out of Portland after leaving Golf Junction; and that plaintiff's "Springwater Division" proceeds in an easterly direction from Golf Junction, and on a trip to or in the direction of Cazadero its cars on said division remain within the corporate limits of Portland for nearly a mile after leaving Golf Junction; and that the station of Nickum is the first station on said "Springwater Division" east of Golf Junction and is only about one-half mile east of the eastern boundary of Portland; and that on said

"Springwater Division" plaintiff runs regular trains which stop for the taking on and letting off of passengers only at stations, and that as there is no station on said division between Golf Junction and Nickum and the former is within Portland and the latter but a short distance out of Portland and passengers are entitled to and can insist upon being carried to the boundary of Portland for five cents and it would be decidedly inconvenient and unnecessarily expensive and to the detriment of the service for plaintiff to stop all its trains at said boundary, plaintiff has extended the five cent fare limit on said division to Nickum as the first station outside of Portland.

11

IX.

That the circumstances and conditions at and about and the service to Nickum are not like or similar to or contemporaneous with the circumstances and conditions at and about the service to the places included in said second district of said "Oregon City Division"; and that the fare charged by plaintiff from Portland to Nickum on said "Springwater Division" does not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff from Portland to the places within said second district for the purpose of determining whether or not the latter are just or reasonable or justly or unjustly discriminatory.

X.

That plaintiff's "Mt. Scott Division" consists of a line of railway running from its said terminus on First and Alder Streets in Portland to Mt. Tabor Junction at about the intersection of Hawthorn Avenue and East Forth-eighth Street in Portland, and then in a general southeasterly direction to Lents in Multnomah County, and then a distance of .62 of a mile to a junction with said "Springwater Division" at a point known as Lents Junction; and that though it is 10.71 miles from Portland to Lents Junction by the "Springwater Division", it is only 8.31 miles from Portland to Lents Junction by the "Mt. Scott Division"; and that the said "Mt. Scott Division" to a point about one mile southeasterly from Mt. Tabor Junction and about 3 miles northwesterly from Lents is wholly within the corporate limits of Portland.

XI.

That the right of way and track and road from Mt. Tabor Junction to Lents were first acquired and constructed by the Portland, Chicago and Mt. Scott Railway Company, a corporation whose stock was principally owned by those who lived or owned property at and between said points; and that plaintiff's predecessor acquired said stock and said right of way and track and road and railway between Mt. Tabor Junction and Lents from the said stockholders and owners under an arrangement and agreement by which, for a valuable consideration, it expressly agreed that no more than a

12 5 cent fare should be charged by plaintiff's predecessor and its successors and assigns for any ride between Lents and

Portland; and that plaintiff is bound by said arrangement and agreement, and by reason thereof cannot charge more than 5 cents for any ride on said "Mt. Scott Division" between Lents and Portland.

XII.

That said "Mt. Scott Division" was extended from Lents to Lents Junction a distance of .62 of a mile, for the benefit and accommodation of the public generally, and particularly that portion thereof residing or being on or near the "Mt. Scott Division" who would desire to go to points on the "Springwater Division" and that portion thereof residing or being on or near the "Springwater Division" would *would* desire to go to points on the "Mt. Scott Division"; and that the 5 cent fare limit on or via the "Mt. Scott Division" was and is stopped at Lents; and that plaintiff could not and cannot charge more than 5 cents for a ride over or via said "Mt. Scott Division" from Lents to Lents Junction or to points within a reasonable distance beyond said Lents Junction on the "Springwater Division."

XIII.

That because of the facts and conditions set forth in the three preceding paragraphs hereof and the situation and conditions of plaintiff's lines and traffic generally, plaintiff cannot charge for a ride from Portland to Lents Junction over the "Springwater Division" more than ten cents—that being the fare it must charge for a ride between said points on the "Mt. Scott Division"; and that it necessarily follows that plaintiff cannot charge more than ten cents for a ride on the "Springwater Division" from Portland to any point between Portland and Lents Junction, for which reasons the fare from Portland to all points between Nickum and Lents Junction is only ten cents.

XIV.

That there is considerable travel between points beyond Lents Junction on the "Springwater Division" and Lents and points between Lents and Portland on the "Mt. Scott Division", such travel transferring from one to the other division at Lents Junction; and that, if more than five cent fare was charged between Lents
13 and any and all points on the "Springwater Division" beyond Lents Junction regardless of their distances beyond Lents Junction, it would result in a division of only .62 of a mile from Lents to Lents Junction for and on which a five cent fare was charged and in unreasonable and unlawful rates from some points beyond Lents Junction to Lents; and that it therefore became necessary to create a district extending from Lents on the "Mt. Scott Division" to Gates on the "Springwater Division", a distance of 2.29 miles and to establish and apply a group rate of ten cents for the fare from Portland via Lents to each station in that district on the "Springwater Division" to-wit: Lents Junction, Gilbert and Gates,—Gates being only 1.67 miles beyond Lents Junction; and that, as it is so became necessary to establish a 10 cent rate from

Portland to Gilbert and to Gates via Lents and the "Mt. Scott Division", plaintiff had to also fix its fare from Portland to Gilbert and to Gates over the "Springwater Division" at 10 cents.

XV.

That the total distance from Portland to Cazadero over the "Springwater Division" is 37.51 miles and the fare charged by plaintiff for the ride from Portland to Cazadero is 80 cents or approximately two cents per mile; and that because of the facts set forth in the preceding paragraphs of this complaint, plaintiff cannot and does not charge more than ten cents for that portion of said ride from Portland to Cazadero which ends at Gates; and that the distance from Gates to Cazadero is 25.23 miles and the remaining 70 cents of the total fare from Portland to Cazadero should be equitably distributed over said 25.23 miles; and that, because it is not practical or convenient to collect fares on the "Springwater Division" other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed said remaining 70 cents of said 80 cent fare from Portland to Cazadero by dividing said remaining 25.23 miles of the total mileage between said points—being the distance from Gates to Cazadero—into fourteen districts and applied to all points within each district a group rate of 5 cents more than the fare to points within the next district nearer Portland, and that, as a matter of fact, these group
14 rate districts on the "Springwater Division" are approximately only 1.81 miles in length, while the group rate districts on the "Oregon City Division" are approximately 2.27 miles in length —showing that, as a whole, lesser fares are charged to intermediate points on the "Oregon City Division" than on the "Springwater Division"—the difference in this regard being due to the difference in the situation and circumstances and conditions of the two divisions as hereinbefore shown and explained; and that the first of said districts on said "Springwater Division" beyond Gates includes the stations of Wilson, Sycamore and Jenne and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; and that the second of said districts on said "Springwater Division" beyond Gates includes the stations of Meadowbrook and Cedarville and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction five cents less; and that in like manner the group rate applied to each of said districts and the fare for and rate to each station in said district from Portland and from Golf Junction increases five cents as each district is reached on the way to Cazadero.

XVI.

That the situation of and the circumstances and conditions governing and controlling the traffic and service upon plaintiff's said "Springwater Division" and said "Mt. Scott Division" are not like or similar to or contemporaneous with the situation of and the cir-

cumstances and conditions governing and controlling the traffic and service upon plaintiff's "Oregon City Division"; and that the fares charged by plaintiff on its said "Springwater Division" and on its said "Mt. Scott Division" do not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff on its "Oregon City Division" for the purpose of determining whether or not any of the latter are just or reasonable or justly or unjustly discriminatory.

XVII.

That the fares charged by plaintiff on all of its said divisions are fair and reasonable and just and in and by none of them is any provision of Chapter 53 of the Session Laws of Oregon for 1907 violated.

XVIII.

That heretofore and on the 30th day of January, 1908, the defendant rendered an order and decision which was thereafter and on the 1st day of February, 1908, served upon plaintiff, upon the application of the town of Milwaukee, a municipal corporation, and against this plaintiff wherein and whereby, notwithstanding all of the facts and circumstances hereinbefore set forth, the said defendant found and declared that the rates, fares and charges demanded and collected by this plaintiff of and from persons traveling in either direction between Lents and Lents Junction, and First and Alder Streets in the City of Portland on the "Mt. Scott Division" and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and the said First and Alder Streets on the said "Springwater Division" are unjustly discriminatory against the said inhabitants of the town of Milwaukee who travel between Milwaukee and said First and Ander Streets and that the practice of this plaintiff in furnishing transfers to passengers on plaintiff's Mt. Scott Division who pay fare to First and Alder Streets in the City of Portland entitling the holder thereof to transportation on other lines of railway and street railway and the refusal of plaintiff to furnish such transfers to the inhabitants of the town of Milwaukee when traveling and paying fare from Milwaukee over plaintiff's lines of railway to First and Alder Streets in the City of Portland, is unreasonable and unjustly discriminatory against the inhabitants of the said town of Milwaukee and also that the said fares and charges of plaintiff between Milwaukee and First and Alder Streets in the City of Portland to-wit: the sum of 10 cents, for a single passage in either direction, is unjust and unreasonable and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and Milwaukee would be the sum of five cents and thereupon said defendant ordered and directed this plaintiff to cease charging the said rate of 10 cents and directed this plaintiff to charge for such transportation of each passenger between said town of Milwaukee and First and Alder Streets in Portland, Oregon, in either direction, the sum of five cents only,

and further directed this plaintiff to afford the same transfer privileges to passengers from said town of Milwaukee to said First and Alder Streets in the City of Portland in either direction, whoch are afforded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction and further required this plaintiff to observe and follow the rates of fare and practice in regard to transfers in said order prescribed by said defendant and to make such change in such charges and rate of fare and said practice in regard to transfers within thirty days from the date of service of said order upon plaintiff.

XIX.

That a copy of said order of said defendant is hereunto attached marked "Exhibit A" and is hereby referred to and expressly made a part of this complaint.

XX.

That the rates, charges and practice of this plaintiff which said defendant in and by the said order declares to be unjust, unreasonable and unjustly discriminatory, are as a matter of fact, reasonable and fair and are not unjustly discriminatory in respect to said town of Milwaukee and the inhabitants thereof, or any other persons traveling as passengers upon said "Oregon City Division" of said plaintiff's railway, or any part thereof, nor by reason of the facts, circumstances and conditions in this complaint set forth, are said rates and practices unjustly discriminatory in respect to any other persons traveling as passengers upon any other of said plaintiff's lines of railway.

XXI.

17 That in making the said order, findings and decisions upon the application of the said town of Milwaukee, and against this plaintiff, the said defendant has wholly ignored and disregarded the facts, circumstances and conditions and the contractual obligations of this plaintiff which have rendered necessary, proper and reasonable the establishment of the said rates hereinbefore set forth upon the said "Mt. Scott Division" and the said "Springwater Division" and because this plaintiff has been and is compelled by said facts, circumstances, conditions and contractual obligations to transport persons traveling as passengers, a greater distance upon said "Mt. Scott Division" and said "Springwater Division" for a less charge or fare than that established by this plaintiff upon said "Oregon City Division" between the said terminus at First and Alder Streets and the said town of Milwaukee and not otherwise, said defendant has arbitrarily and unlawfully by its said order dated January 30, 1908, required and commanded this plaintiff to reduce its just and reasonable charges and fares upon said "Oregon City Division" between said First and Alder Streets and the said town of Milwaukee.

XXII.

That the said rates, charges and tolls fixed and established and charged and collected by this plaintiff for persons traveling as pas-

sengers between said town of Milwaukee and said First and Alder Streets are reasonable and such only as, considering the volume of the traffic and the expense of maintenance and operation of plaintiff's railroads to afford a reasonable return upon plaintiff's investment in said railroad.

XXIII.

That the distance on said "Oregon City Division" between said Golf Junction and said town of Milwaukee is 1.35 miles and that in and by the said order of the said defendant, plaintiff is required and commanded to transport persons traveling as passengers over said 1.35 miles of plaintiff's said railroad for no compensa-
18 tion whatsoever, which action of said defendant this plaintiff alleges to be unjust, unreasonable and unlawful and not within the power of said defendant under the terms and provisions of said Chapter 53 of the General Laws of Oregon, Session 1907.

XXIV.

That the rates, fares and charges to be charged and collected by this plaintiff for the transportation of passengers between the points described in the said order of the defendant, fixed in said order, are unreasonable and unlawful and that if permitted to go into effect would deprive plaintiff of a just and reasonable or any net profit or return upon the transportation of passengers traveling over the portions of said plaintiff's railroad affected by said order of said defendant, and that the regulations and practice prescribed and fixed in said order of said defendant to be followed and observed by this plaintiff, are and each of them are unreasonable.

XXV.

That in making the said order and decision aforesaid, the said defendant has exceeded the powers conferred upon it by the Act of the Legislature of Oregon creating the said defendant and which act is known as Chapter 53 of the general laws of Oregon, Session of 1907, in that said defendant in making said order has found and based the said order upon the finding of said defendant, and that the said rates of fare charged and collected by plaintiff from different points on different and separate lines of plaintiff's railways are unjustly discriminatory against the said town of Milwaukee, a municipal corporation, and the inhabitants thereof, who travel to said plaintiff's terminal at First and Alder Streets in Portland from other points and upon an entirely different and separate line of plaintiff's said railways.

XXVI.

That to permit the said order and decision of the said defendant to go into effect would unjustly and seriously impair the revenues of this plaintiff and would result in great and irreparable damage and injury to this plaintiff.

19 XXVII.

That plaintiff has no plain, speedy or adequate remedy at law.

XXVIII.

That should this Honorable Court after a full hearing upon the issues raised in this cause render a decision herein enjoining the taking effect of the said order of the said defendant or any part thereof, that in the interim between the filing of this complaint and the rendering of such decree, this plaintiff would be required to charge only the rates and fares fixed in and by the said order of the said defendant and that by reason of the great number of passengers that would be transported by plaintiff on said railway between the points thereon affected by said order and by reason of the provisions of said Chapter 53 of the general laws of Oregon, Session 1907, it would be impossible for this plaintiff to recover of and from the persons traveling as passengers upon its said line of railway, affected by the said order, the said five cents per passenger which is the reduction in fare fixed by said defendant and which would result in great and irreparable damage and injury to this plaintiff.

Wherefore, plaintiff prays that a temporary restraining order be issued out of this court directed to the said defendant suspending and staying the operations of the said order of the said defendant until such time as a final hearing and determination of this cause can be had and that upon such final hearing plaintiff be granted a decree herein vacating and setting aside the said order of the said defendant; that plaintiff have such other, further or different relief as to the court may seem meet and equitable and that plaintiff have and recover of and from defendant its costs and disbursements herein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

20 STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn say that I am Vice President of the Portland Railway Light and Power Company, plaintiff named in the above entitled suit, that I have read the foregoing complaint and that the same is true as I verily believe.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.]

C. A. MANEY,
Notary Public for Oregon.

21 "EXHIBIT A."

Before the Railroad Commission of Oregon.

No. 89, F. 18.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Order.

Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the argument of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and own- and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a municipal corporation of the State of Oregon situated on the defendant's Oregon City Division.

22 (3) That the defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 miles	5 cents.
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5 cents.
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 "
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

23 (4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction,

Gilbert and Gates and the said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the inhabitants of the town of Milwaukee who travel between Milwaukee and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the inhabitants of the town of Milwaukee when traveling and paying fare from Milwaukee over the defendant's line of railroad to First and Alder Streets in the City of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the inhabitants of the town of Milwaukee.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of ten cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and Milwaukee would be the sum of five cents.

It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz., five cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be

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necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:

GEO. O. GOODALL, *Secretary.*

A true copy:

GEO. O. GOODALL, *Secretary.*

And afterward, on the 27th day of February, 1908, the following

Summons

was duly filed in the office of the said clerk.

(Title.)

To Railroad Commission of Oregon, Defendant:

In the name of the State of Oregon: you are hereby required to appear and answer the complaint filed against you in the entitled suit within ten days from the date of service of this mons upon you, if served within this County; and if you answer, for want thereof, the plaintiff will apply to the court for a decree as prayed for in the complaint, vacating and setting aside that certain order made by the defendant on the 30th day of uary, 1908, on the application of the Town of Milwaukee, a municipal corporation, plaintiff, and against Portland Railway Light and Power Company, defendant, and the whole thereof, which said order of the said defendant provides as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents, and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further ordered, considered and determined that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder

Streets in the City of Portland, in either direction, and that
27 the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discrimantory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.";

and for such other, further or different relief as to the court may seem meet and equitable in the premises and for judgment against you for plaintiff's costs and disbursements in the said suit.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

On which summons was made the following return:

STATE OF OREGON,
County of Marion, ss:

I hereby certify that I served the within summons within the said State and County, on the 27th day of February, 1908, on the within named defendant, Railroad Commission of Oregon, by delivering a copy thereof, prepared and certified by me, as Sheriff, together with a copy of the complaint, prepared and certified to by Franklin T. Griffith, one of plaintiff's attorneys, to Geo. O. Goodall, Secretary of said Railroad Commission.

W. J. CULVER,
Sheriff of Marion County, State of Oregon,
By H. P. MINTO,
Dep'ty.

28 And afterward, on the 28th day of February, 1908, there was duly made and entered of record, an

Order Directing Notice of Hearing on Application for Injunction.

words and figures as follows:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and

OR COPY

the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock, P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to make in the premises, and show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares, and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the
29 City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded to passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant

serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

Dated Feb. 27, 1908.

30 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, a

Motion for Temporary Injunction and Order Fixing Time of Hearing,

in words and figures as follows, viz:

(Title.)

To Railroad Commission of Oregon, defendant above named:

Take notice that the above named plaintiff will, on Monday, the second day of March, 1908, at the hour of one o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, will present the hereunto attached motion and will move the above entitled court for a temporary injunction as prayed for therein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

It is hereby ordered that the foregoing notice be served upon the defendant not less than two days prior to the said second day of March, 1908.

WM. GALLOWAY,
Judge of the Circuit Court of the State of Oregon for the County of Marion.

31 And afterwards on the 27th day of Feb'y, 1908, the following

Order of Court

was entered:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to

make in the premises, and to show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and
32 Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered, and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

Dated Feb. 27, 1908.

33 And afterwards on the — day of February, 1908, the following

Motion

was filed:

(Title.)

Comes now the plaintiff above named by Frederick V. Holman and Franklin T. Griffith, its attorneys and, based upon the affidavit

of F. I. Fuller hereunto attached and the complaint of plaintiff on file herein, moves the court to grant a temporary injunction herein suspending and staying the operation of that certain order and decision of the defendant dated the 30th day of January, 1908, and fully set forth and described in plaintiff's complaint and the whole thereof until the final determination of the above entitled cause.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

To which was attached the following

Affidavit.

(Title.)

STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn, say that I am Vice President of Portland Railway Light and Power Company, plaintiff in the above entitled suit; that heretofore and on the 30th day of January, 1908, the defendant made and thereafter served upon the said plaintiff a certain order and decision of said defendant commanding and requiring this plaintiff, within thirty days from the service of said order upon this plaintiff, to reduce the rates of fare charged and collected by this plaintiff from persons traveling as passengers upon the line of railway of this plaintiff known as plaintiff's Oregon City Division, which order and decision commands and requires this plaintiff, after the expiration of said thirty days, to charge and collect a fare of — cents only from each person traveling as a passenger upon this plaintiff's said Oregon City Division between the town of Milwaukee on said division, the terminus of plaintiff's said Oregon City Division of railway at First and
34 Alder Streets in the City of Portland, Oregon, whereas the rates of fare heretofore and now charged and collected by this plaintiff of and from persons traveling as passengers upon said Oregon City Division between the said points has been and is the sum of ten cents.

That said order and decision of said defendant further requires and commands this plaintiff, within said period of thirty days, to furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

That this plaintiff has commenced in the above entitled court a suit against the said defendant for the purpose of setting aside and vacating the said order and decision of the said defendant for the reasons and upon the grounds that the said order and decision is unlawful and unreasonable as fully set forth in plaintiff's said complaint.

That the said order and decision of the said defendant was served upon this plaintiff on the 1st day of February, 1908, and, unless

stayed and suspended by order of this Honorable Court, will go into effect on the 2d day of March, 1908.

That should the said order and decision of the said defendant be permitted to go into effect the said plaintiff will thereafter and until the final determination of the said suit be required to reduce its charges for said transportation and will be required to issue the said transfers as required by the said order and decision, and that should the said order and decision, at the final hearing of the said suit, be vacated and set aside this plaintiff will be unable to recover of and from the persons traveling as passengers upon its said line of railroad and paying said reduced fare, the additional fare to which plaintiff is entitled, and that all of such additional fare would be wholly lost to said plaintiff to its great and irreparable damage and injury.

That it is provided by Chapter 53 of the General Laws of Oregon, Session 1907, that should a temporary injunction be issued
35 suspending or staying the operation of any such order of the said defendant that all persons traveling as passengers upon plaintiff's line of railway during the pendency of such suit and the continuance of such temporary injunction can recover in an action at law, as in Chapter 53 provided, the excess fare so paid and that no damage or injury would be sustained by any of such persons traveling as such passengers by reason of such temporary injunction.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.] C. A. MANEY,
Notary Public for Oregon.

STATE OF OREGON,
County of Marion, ss:

Due service of the within order, notice, motion and affidavit is hereby accepted in Marion County, Oregon, this 28 day of February, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith of attorneys for plaintiff.

RAILROAD COMMISSION OF OREGON,
By CLYDE B. AITCHISON, *Commissioner.*

36 And afterward, on the 2d day of March, 1908, the defendant duly filed with the said clerk, an

Answer

in words and figures as follows:

(Title.)

Now comes the defendant above named and for answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

First. Denies each and every allegation of the complaint except as hereinafter expressly admitted.

Second. Admits all of paragraph 1 of the complaint, except the allegation that plaintiff is or has been engaged in operating street railways within the City of Portland and railroads without the City of Portland between the termini set out in subparagraphs lettered "a, b, c, and d," of said paragraph 1; and defendant alleges that the plaintiff, at the time set out in said paragraph 1, was and is engaged in the operation of one continuous system of electric railways, carrying freight, passengers, and express between the termini set out in said paragraph.

Third. Admits that the plaintiff established certain rates of fare for the transportation of persons upon its lines of railway and between the different points on its railway and its terminus, at First and Alder Streets in the City of Portland and between Golf Junction to the places and points named in paragraph 2, and that the rates, fares, and charges established by the plaintiff are set out in said paragraph 2, and that the distances set out in said paragraph 2 are substantially correct, but this defendant denies that the rates, fares and charges so established by the plaintiff are the reasonable rates of fare for the transportation of persons traveling between said points; and this defendant especially denies that the rate of fare established and charged between First and Alder Streets in the City of Portland and the town of Milwaukee, to-wit: ten cents, is a reasonable rate of fare or charge, and alleges that no greater fare than five cents is a reasonable rate, fare or charge between said points for the transportation of persons traveling as passengers upon plaintiff's said railway lines.

37 Fourth. Admits all of paragraph 3 of the complaint.

Fifth. Admits the allegation in paragraph 4 of the complaint alleging that the City of Portland has a population exceeding fifty thousand inhabitants.

Sixth. Admits all of paragraph 5 of said complaint.

Seventh. Admits that the fares charged by the plaintiff are set out in paragraph 6 of the complaint, but the defendant specifically denies that it is not practicable or convenient to collect fares on said Oregon City Division other than in multiples of five cents, and alleges that on the contrary, it is practicable and convenient to collect fares on said division in multiples of one cent, or any number of cents.

Eighth. Admits that the plaintiff has established commutation rates and established commutation books, as alleged in paragraph 7 of the complaint, but the defendant alleges that no transfers are given to persons riding upon or using said commutation rates for coupons.

Ninth. Admits the allegations of paragraph 8 of the complaint, except that on a trip to or in the direction of Cazadero the cars of said division run in the corporate limits of Portland for nearly a mile after leaving Golf Junction and on the contrary alleges that they only run in the corporate limits for three thousand and thirty-seven (3037) feet, and admits that the station of Nickum is the first

station on said Springwater division east of Golf Junction, but denies that it was only about one-half mile east of the eastern boundary of Portland, and on the contrary alleges that it is three thousand and sixty (3060) feet east of the eastern boundary of the City of Portland, and defendant expressly denies that passengers are entitled to and can insist on being carried to the boundary of Portland for five cents from Nickum, or that it would be decidedly inconvenient or unnecessarily expensive, or to the detriment of the service for plaintiff to stop all of its trains at said boundary, or any of its trains at said boundary.

38 Tenth. Admits all of paragraph 10 of the complaint.

Eleventh. Admits all of paragraph 11 of the complaint, and affirmatively alleges that the traffic on said Portland-Chicago and Mt. Scott Railway Company's line has so increased that the plaintiff has voluntarily increased the number of trains or cars required in said contract mentioned by the plaintiff in said paragraph from twelve to about fifty cars per day each way, and such increase of trains and cars has been voluntarily made by plaintiff to accommodate the increased traffic upon said portions of the plaintiff's line.

Twelfth. Admits that the fare charged by the plaintiff for the ride from Portland to Cazadero is eighty cents, and that the distances from Portland to Cazadero and from Gates to Cazadero are as alleged in paragraph 15 of the complaint.

Thirteenth. Admits all of paragraph 18 and 19 of the complaint, including order 89, marked "Exhibit A" and attached to said complaint.

Fourteenth. Admits that on the 30th day of January, 1908, it made the order mentioned in paragraph 21 of said complaint, but denies each and every other allegation thereof, and alleges that in making said order, it made the same upon complaint of the town of Milwaukee and that it proceeded as required by the provisions of chapter 53, laws of Oregon for 1907, and that testimony was produced by each party thereto, including the plaintiff herein, and all of the testimony produced by both parties was duly considered and acted upon in making said order, and as required by the provisions of this act, this defendant now causes a certified transcript of all the proceedings had and testimony taken upon such investigation to be filed herewith with the clerk of this court.

Defendant, further answering the complaint herein, alleges:

First. That instead of unjustly or seriously or at all impairing the revenues of this plaintiff, as alleged in paragraphs 26 and

39 28 of the complaint, that if the said order of defendant is permitted to stand, it will materially add to the revenues of the plaintiff, by reason of increased travel, which would be greatly stimulated by the reduction in fares and the giving of transfers.

Second. That the order of the defendant, set out in plaintiff's complaint and sought to be set aside and suspended herein, is in all respects just and reasonable.

3. That the town of Lents is distant from the depot of this plaintiff, situated on the corner of First and Alder Streets, in the City of Portland, Multnomah County, State of Oregon, seven and sixty-

nine hundredths (7.69) miles; that the town of Lents is distant from the city limits of the City of Portland, Multnomah County, State of Oregon, two and three-quarters (2 3-4) miles; that the station of Nickum is distant from the depot of this plaintiff, situated at the corner of First and Alder Streets, in the City of Portland, Multnomah County, State of Oregon, six and fifty-one hundredths (6.51) miles, and is distant from the city limits of the City of Portland to the said town of Nickum three thousand (3,000) feet; that the town of Milwaukee is distant from *from* the depot of this plaintiff, located on the corner of First and Alder Streets, in the City of Portland, Multnomah County, State of Oregon, six and seventy-one hundredths (6.71) miles, and is distant from the Golf Links, or the city limits of the City of Portland, to the City of Milwaukee, one and thirty-five hundredths (1.35) miles; that the said plaintiff charges the people who reside in Lents and the people who reside in Nickum a fare of five cents in riding to and from the City of Portland; that the said plaintiff, with a view of discriminating against the town of Milwaukee and its citizens, charges the people traveling to and from the City of Milwaukee and the City of Portland a fare of ten cents; that the defendant alleges that charging the people who travel to and from the town of Milwaukee to the City of Portland a fare of ten cents, while they charge the people who travel to and from the towns of Lents and Nickum to the City of Portland a fare of five cents, is an unjust discrimination and unjust preference against the town and citizens of Milwaukee, and has been greatly injurious to the citizens and town of Milwaukee.

Wherefore, defendant prays that this suit be dismissed, and for costs and disbursements herein.

A. M. CRAWFORD,
Attorney General, and
CLYDE B. AITCHISON,
Attorneys for Defendant.

STATE OF OREGON,
County of Marion, ss:

I, Thomas K. Campbell, being first duly sworn, say that I am Chairman of the Railroad Commission of Oregon in the above entitled cause, and that the facts set forth in the foregoing answer are true, as I verily believe.

THOS. K. CAMPBELL.

Subscribed and sworn to before me this 29th day of February, 1908.

[SEAL.]

I. H. VAN WINKLE,
Notary Public for Oregon.

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within answer by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of

the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Plaintiff.

41 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, an

Appearance Against Motion for Preliminary Injunction

in words and figures as follows:

(Title.)

Now comes the defendant above named and opposes the motion for temporary injunction herein, for the following reasons:

First. That the complaint does not set forth facts sufficient to show that the order or decree appealed from was procured through fraud, surprise, or mistake or by any fault of the opposite party, and shows said order to have been issued by the defendant after a trial, duly had between the plaintiff herein and the town of Milwaukee, or that said order is unlawful, unjust, or unreasonable.

Second. That neither the complaint nor the affidavits filed by plaintiff disclose any facts which call for the issuance of a preliminary injunction.

Third. That the pleadings taken together, show that the plaintiff is estopped from demanding a preliminary injunction.

Fourth. That all alleged equities in the complaint are denied by the answer.

Dated this 2d day of March, 1908.

A. M. CRAWFORD, *Att'y General and* and
CLYDE B. AITCHISON AND GILTNER & SEWALL,
Attorneys for Defendant.

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within notice of appearance by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Pl'ff.

42 And afterwards, on the 3d day of March, 1908.

Order on Injunction.

(Title.)

This matter coming on to be heard this second day of March, 1908, plaintiff appearing by Franklin T. Griffith, Esq., counsel, and the

defendant appearing by A. M. Crawford, Attorney General, Giltner and Sewall and C. B. Aitchison, its attorneys, and the Court having heard the motion of plaintiff for a temporary injunction herein and the argument of counsel for the parties and being satisfied from the affidavits presented on behalf of the plaintiff and the pleadings in said cause that the said motion for a temporary injunction should be allowed,

Now, therefore, it is ordered, that said motion for a temporary injunction be and the same is hereby allowed and that the operation of the order of said defendant dated the 30th day of January, 1908, wherein said defendant ordered and required the said plaintiff to desist in certain practices and to put in effect certain rates in said order specified, which are as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1 viz: ten cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City
43 of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendan*d* shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service,"

be stayed and suspended until the final determination of this cause herein upon condition that the said plaintiff shall make and execute a bond herein in the sum of Five Thousand Dollars as by law required in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such case made and provided, to be approved by this court.

And it is further ordered that from and after filing and the ap-

proval of said bond as aforesaid the operation of said order of the said Commission be and the same is hereby suspended and stayed until the final determination of the said cause in this court.

And it is further ordered that within five days from the date hereof the said Portland Railway Light and Power Company shall commence and thereafter continueduring the term of said temporary injunction to issue to each person traveling as a passenger upon its said Oregon City Division between the stations of Milwaukee
44 and First and Alder Streets in the City of Portland, Oregon, in either direction and paying a cash fare therefor of ten cents, a receipt or other evidence to the effect that five cents of said ten cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said Portland Railway Light and Power Company should it be determined in this cause that said temporary injunction has been wrongfully issued.

Dated this second day of March, 1908.

WM. GALLOWAY, *Judge.*

45 And afterward, on the said 3d day of March, 1908, the said plaintiff duly filed with the said clerk, its

Undertaking on Injunction

in words and figures as follows:

(Title.)

Whereas, the above named plaintiff has commenced a suit in the Circuit Court of the State of Oregon in and for Marion County, against the above named defendant and is about to apply for an injunction in said suit against said defendant enjoining and restraining it from the commission of certain acts, as in the complaint filed in the said suit, is more particularly set forth and described, and suspended and staying that certain order of said defendant dated the 30th day of January, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said

defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder
46 Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this company as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Now, therefore, we, Portland Railway Light and Power Company as principal, and American Surety Company of New York as surety in consideration of the premises, and of the issuing of said injunction do jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said injunction shall issue, the said plaintiff shall pay all costs and disbursements that may be decreed to the defendant and also the said Portland Railway Light and Power Company shall answer for all damages caused by the delay in the enforcement of the said order of the defendant and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the said defendant had not been suspended during the period transpiring from the issuance of said injunction until the final determination of the questions litigated in said suit not exceeding the sum of Five Thousand Dollars as it or they may sustain by reason of the said injunction, if the same be wrongfully — or without sufficient cause.

Dated this 2d day of March, 1908.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,

47 By FRANKLIN T. GRIFFITH,
Its Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOMER H. SMITH,
[SEAL.] *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Ass't Secretary.

Due and legal service of the within undertaking is hereby accepted in Marion County, Oregon, this 2d day of March, 1908.

A. M. CRAWFORD,
Attorney for Defendant.

Endorsed: Approved March 2d, 1908. Wm. Galloway, Judge.

48 And afterwards, on the 12th day of March, 1908, the said defendant duly filed with the said clerk, its

Motion

in words and figures as follows, viz:

(Title.)

Now comes the defendant above named and moves the court for leave to amend its answer by inserting paragraph 3 on page 5 after paragraph 2 in its further and separate answer and just before the prayer of said answer, to-wit:

3. That the town of Lents is distant from the depot of this plaintiff, situated on the corner of First and Alder Streets, in the City of Portland, Multnomah County, State of Oregon, seven and sixty-nine hundredths (7.69) miles; that the town of Lents is distant from the city limits of the city of Portland, Multnomah County, State of Oregon, two and three-quarters (2¾) miles; that the station of Nickum is distant from the depot of this plaintiff, situated at the corner of First and Alder Streets, in the city of Portland, Multnomah County, State of Oregon, six and fifty-one hundredths (6.51) miles, and is distant from the city limits of the city of Portland to the said town of Nickum three thousand (3,000) feet; that the town of Milwaukee is distant from the depot of this plaintiff, located on the corner of First and Alder Streets in the city of Portland, Multnomah County, State of Oregon, six and seventy-one hundredths (6.71) miles, and is distant from the Golf Links, or the city limits of the city of Portland, to the city of Milwaukee, one and thirty-five hundredths (1.35) miles; that the said plaintiff charges the people who reside in Lents and the people who reside in Nickum a fare of five cents in riding to and from the city of Portland; that the said plaintiff, with a view of discriminating against the town of Milwaukee and its citizens, charges the people traveling to and from the city of Milwaukee and the city of Portland a fare of ten cents; that the defendant alleges that charging the people who travel to and from the town of Milwaukee to the city of Portland a fare of ten cents, while they charge the people who travel to and from

49 the towns of Lents and Nickum to the city of Portland a fare of five cents, is an unjust discrimination and undue preference against the town and citizens of Milwaukee, and has been greatly injurious to the citizens and town of Milwaukee.

GILTNER & SEWALL AND
A. M. CRAWFORD,
Att'y Gen.,
Attorneys for Defendant.

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within motion by the receipt of a copy thereof duly prepared and certified by R. R. Giltner, one of

the attorneys for defendant, is hereby admitted in said county and state, this 12th day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Pl'ff.

50 And afterwards, on the 12th day of March, 1908, the following

Order

was duly entered of record, viz:

(Title.)

On this day this cause comes on to be heard on defendant's motion to amend the answer heretofore filed herein, by interlineation, plaintiff appearing by F. V. Holman and F. T. Griffith, its attorneys, and the defendant appearing by A. M. Crawford, Giltner and Sewall and C. B. Aitchison, its attorneys, and after hearing the argument of counsel and the court being fully advised in the premises, it is ordered that said answer be amended by pasting allegation 3 after allegation 2 of said answer.

51 And afterwards, on the 22d day of June, 1908, the Court duly rendered and filed its

Findings of Fact and Conclusions of Law

in words and figures as follows:

(Title.)

This suit was regularly tried before the court, and it was stipulated by and between the respective attorneys herein that the two cases, one known as the "Milwaukee Case," Number 8962, and one known as the "Oak Grove Case, Number 8963, both entitled as aforesaid, should be tried together, and that the testimony so taken shall be used and considered in both cases; and that the testimony taken in both cases before the Railroad Commission of Oregon should be used and considered in both of the said suits, so far as applicable, and subject to objections.

Frederick V. Holman and Franklin T. Griffith appeared as attorneys for the plaintiff, and Hon. A. M. Crawford, Attorney General of the State of Oregon, Clyde B. Aitchison, and Giltner and Sewall appeared as attorneys for the defendant in the above entitled suit.

Additional evidence to that taken before the said Commission was taken in both cases in the above entitled suit. After the conclusion of the testimony, pursuant to an order of the Court, duly made and entered, the said testimony was referred back to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907. Thereafter, as provided by law, the said Commission, after con-

sidering all the evidence in this suit and the argument of the respective counsel, amended its former order and returned the same together with the transcript of the evidence, papers and exhibits, to this Court.

After hearing all the evidence in this suit, the arguments of the respective counsel, and being fully advised in the premises, now at this time the Court makes these, its Findings of Fact and Conclusions of Law, and files the same in this court.

Findings of Fact.

1.

That the plaintiff Portland Railway Light & Power Com-
52 pany is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, known as the "Oregon City Division," and also a line of railroad from said First and Alder Streets to Lents and Lents Junction, Multnomah County, Oregon, known as the "Mount Scott Division," and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Nickum, Gates and Cazadero, in Clackamas County, Oregon, said Nickum, Gates and Lents being points outside of the City of Portland, Oregon.

2.

That the defendant is the duly appointed, organized and acting Railroad Commission of Oregon, under the provisions of Chapter 53 of the Laws of Oregon for the year 1907.

3.

That the town of Milwaukee is a municipal corporation duly organized under and existing by virtue of the laws of the state of Oregon.

4.

That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

That its street cars are operated by electric power within the
53 City of Portland and to the City of St. Johns, Multnomah County, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein: and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

5.

That plaintiff has established rates of fare for the transportation ow persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder Streets in said City of Portland, and between Golf Junction and the places and points named below, the following rates, fares and charges being those so established and the distances being as given below:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36	miles	5 cents.
Lambert	5.93	"	10 "
Knight	6.29	"	10 "
Hendee	6.44	"	10 "
Milwaukee	6.71	"	10 "
Island	7.05	"	10 "
Milwaukee Heights	7.70	"	15 "
Courtney	8.30	"	15 "
Oak Grove	8.48	"	15 "
Center	8.68	"	15 "
Risley	9.26	"	15 "
Oregon City	14.47	"	25 "
Canemah	15.47	"	25 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69	"	5 "
Lents	7.69	"	5 "
Lents Junction	8.31	"	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35	"	5 "
Nickum	6.51	"	5 "
Kerrigan	7.26	"	10 "
Bell	8.51	"	10 "
Kendall	9.32	"	10 "
Lents Junction	10.71	"	10 "
Gilbert	11.65	"	10 "
Gates	12.38	"	10 "
Wilson	13.00	"	15 "
Sycamore	13.48	"	15 "
Jenne	14.42	"	15 "

54 Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5	cents.
Knight	.93 "	5	"
Hendee	1.08 "	5	"
Milwaukee	1.35 "	5	"
Island	1.69 "	5	"
Milwaukee Heights	2.34 "	10	"
Courtney	2.94 "	10	"
Oak Grove	3.12 "	10	"
Center	3.32 "	10	"
Risley	3.90 "	10	"
Oregon City	9.21 "	20	"
Canemah	10.21 "	20	"

On Springwater Division.

Nickum	1.15 "	5	"
Kerrigan	1.90 "	5	"
Bell	3.15 "	5	"
Kendall	3.96 "	5	"
Lents Junction	5.35 "	5	"
Gilbert	6.29 "	10	"
Gates	7.02 "	10	"
Wilson	7.64 "	10	"
Sycamore	8.12 "	10	"
Jenne	9.07 "	10	"

6.

That the distance between Lents and the limits of the City of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild, on plaintiff's said Mt. Scott line, is a mile and one half from Lents, and two miles outside the limits of the City of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said Company near First and Alder Streets in the said City of Portland, to the terminus in the City of St. Johns, Oregon, is to-wit: nine miles. The distance from the said terminus in the City of Portland, Oregon, to the city limits of the said city of St. Johns is about seven miles, and from there to the terminus in the said City of St. Johns proper is about two miles.

7.

That the aforesaid places are suburbs of the City of Portland.

8.

That plaintiff's predecessor acquired about four miles of track and right of way which extended from Mt. Tabor Junction and

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Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration
55 thereof that not more than a five cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and Portland, the plaintiff is car-ying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

9.

That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of passengers between First and Alder Streets in the City of Portland, and Lents, and intermediate points.

10.

That at the time said Lents contract was entered into the town of Milwaukee had a population of about 500 people; that at all times since said Lents contract was entered into the plaintiff and its predecessor companies has charged ten cents for the transportation of passengers between First and Alder Streets in the city of Portland and the town of Milwaukee. That since the five cents fare between Lents and Portland has been in operation it has caused the said Lents and Lents territory to increase in population as aforesaid, and said land values in said Lents and Lents territory to increase in value as aforesaid, and has stagnated the growth and population of the town of Milwaukee territory and its business has not appreciably increased.

56 11.

That by reason of the fact that the inhabitants of the town of Milwaukee are charged double the fare charged the inhabitants of Lents for transportation between their respective residences and the city of Portland, the inhabitants of the town of Milwaukee have paid to the plaintiff large sums of money in the aggregate for transportation from the town of Milwaukee in excess of the charges made inhabitants of Lents for transportation from Lents to First and Alder Streets in the City of Portland, to the great injury to the said inhabitants of Milwaukee; and that a just and reasonable rate, not discriminatory to be charged to persons between First and Alder Streets in the city of Portland and the town of Milwaukee, Oregon, is five cents.

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12.

That the bulk of the inhabitants of the town and territory of Milwaukee are employed in the City of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

13.

That the population and territory between and including Lents and Hazelwild a distance of one and one-half miles, on plaintiff's Mt. Scott line, are substantially the same territory and population between Golf Junction on the City Limits of Portland and
57 Milwaukee, a distance of 1.31 miles, on plaintiff's Oregon City Division. That the conditions and circumstances under which plaintiff transports passengers between First and Alder Streets in said city of Portland, and the stations on the Mount Scott line from Hazelwild to Lents inclusive, are substantially the same as the circumstances and conditions under which plaintiff transports passengers from said First and Alder Streets to stations on the Oregon City line from said Golf Junction to Milwaukee inclusive, except as to the rate of fare charged and the giving of transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Hazelwild to Lents inclusive.

14.

That Nickum is a station on the plaintiff's Springwater Division, 1.15 miles easterly from Golf Junction, and about 3000 feet outside the city limits of the city of Portland, Oregon. That the plaintiff operates but seven trains per day through Nickum, between Cazadero and Portland, in either direction. That otherwise, except as to the rates of fare charged and the giving of transfers, and conditions and circumstances as to the transportation of passengers between Nickum and the plaintiff's terminus at First and Alder Streets aforesaid, are substantially the same as between said terminus and Milwaukee, and except also that the travel between Milwaukee and Portland is greater than between Nickum and Portland.

15.

That from points on the Mt. Scott Division without the City of Portland, and Nickum on the Springwater Division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the City of Portland, and the City of St. Johns, and that such transfers are not furnished to the citizens of Milwaukee traveling and paying fare from Milwaukee to said First and Alder Streets.

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16.

That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City Division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott Divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the town of Milwaukee are unjust and unreasonable, discriminatory and give undue preference.

17.

That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income, or expenditures, or profits or loss if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

18.

That the plaintiff operates its cars and transports passengers between First and Alder Streets and Milwaukee either wholly over the Oregon City Division, from the junction at the east end of the Madison Street bridge, or from said junction over what it terms its Sellwood division to Golf Junction, and then over the Oregon City division to Milwaukee. The plaintiff credits all of the Milwaukee business transported by way of the Sellwood division to that division, and no credit or account is taken of it as in part earned by the Oregon City division. That the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff. That the court is therefore unable to find as to the traffic density to and from Milwaukee, or on the Oregon City division or any of the plaintiff's other divisions.

19.

59 That on to-wit: January 30th, 1908, the defendant, after due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain order and findings set out as "Exhibit A" attached to the plaintiff's complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that the same is now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment and transcript are hereby made a part of these findings.

Conclusions of Law.

1. That the equities of this suit are with the defendant, and that the plaintiff's complaint should be dismissed.

2. That the practice of the plaintiff in charging, demanding and collecting of and from persons traveling in either direction between Milwaukee and First and Alder Streets in the City of Portland, the sum of ten cents, while charging persons traveling in either direction between said First and Alder Streets and Nickum, Kerrigan, Lents, Lents Junction, Bell, Gilbert and Gates the rates of fare hereinbefore set out, are unjustly discriminatory and unjustly preferential as against the inhabitants of the town of Milwaukee and the locality of the town of Milwaukee, and persons who travel between Milwaukee and First and Alder Streets aforesaid.

3. That the practice of the plaintiff in furnishing to passengers who travel from points on the Mount Scott Division without the City of Portland, to First and Alder Streets in the City of Portland, transfers entitling the said passenger to transportation over the lines of the Portland Railway Company, and in not furnishing the travelers who pay fare from Milwaukee to said First and Alder Streets similar transfers, is unreasonable, unjustly discriminatory and unjustly preferential as against the inhabitants of the town of
60 Milwaukee, the locality of the town of Milwaukee, and persons traveling from First and Alder Streets to Milwaukee in either direction.

4. That the existing fare and charge made by the plaintiff for the transportation of passengers between Milwaukee and First and Alder Streets in the city of Portland, Oregon, to-wit: ten (10) cents, is unjust and unreasonable, and that a just and reasonable charge for such transportation is five (5) cents.

5. That the Lents contract relied upon by the plaintiff as justifying the discriminations aforesaid, is not a sufficient excuse or justification for the aforesaid discriminatons and preferences against the locality of the town of Milwaukee, the inhabitants thereof, and passengers traveling over plaintiff's line between Milwaukee and First and Alder Streets. That the subject matter of said contract constitutes a part of the facilities incident to the transportation of passengers from Lents to First and Alder Streets aforesaid, and the enforcement thereof is in violation of the provisions of Chapter 53, Laws of Oregon for the year 1907, is against public policy and is illegal and void.

6. That the amended order of the defendant complained of is reasonable, just, valid and lawful in all respects.

7. That the defendant should recover of and from the plaintiff the costs and disbursements of this suit.

Dated at Salem, Oregon, this 22d day of June, 1908.

WM. GALLOWAY, *Judge.*

61 That thereafter, and on the said 22d day of June, 1908, the following

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Decree

was duly made and entered of record, viz:

(Title.)

Based upon the foregoing findings of fact and conclusions of law and the pleadings and evidence in this cause, the plaintiff appearing by Franklin T. Griffith and Frederick V. Holman, its attorneys, and the defendant appearing by R. R. Giltner, C. B. Aitchison and A. M. Crawford, its attorneys, and the Court being fully advised in the premises, it is considered, adjudged and decreed that the modified order of defendant, being order No. 89, be and the same is hereby adjudged and decreed to be in all things and respects just and reasonable and in accordance with law and in full legal force and effect, and that plaintiff be and hereby is adjudged and decreed in all matters, things and transactions affected thereby, to obey the same in all its terms and conditions and in accordance with the intent and spirit thereof. Said amended order is in words and figures as follows, to-wit:

Before the Railroad Commission of Oregon.

No. 89, F. 18.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Order.

62 Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the State of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Di-

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vision) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a municipal corporation of the state of Oregon situated on the defendant's Oregon City Division.

(3) That the said defendant makes the following charges and collects the following fares, to-wit:

63 Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5 "
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5 "
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 "	5 "
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "

Island	1.69	"	.... 5 "
Milwaukee Heights	2.34	"	....10 "
Courtney	2.94	"	....10 "
Oak Grove	3.12	"	....10 "
Center	3.32	"	....10 "
Risley	3.90	"	....10 "

On Springwater Division.

Nickum	1.15	"	.... 5 "
Kerrigan	1.90	"	.... 5 "
Bell	3.15	"	.... 5 "
Kendall	3.96	"	.... 5 "
Lents Junction	5.35	"	.... 5 "
Gilbert	6.29	"	....10 "
Gates	7.02	"	....10 "
Wilson	7.64	"	....10 "
Sycamore	8.12	"	....10 "
Jenne	9.07	"	....10 "

64 (4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the inhabitants of the town of Milwaukee who travel between Milwaukee and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the inhabitants of the town of Milwaukee when traveling and paying fare from Milwaukee over the defendant's line of railroad to First and Alder Streets in the city of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the inhabitants of the town of Milwaukee.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of ten cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and Milwaukee would be the sum of five cents.

It is therefore ordered, considered and determined, that the said

Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the
65 transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1 viz: ten cents, and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, Oregon in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedule on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

66 Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

[Seal of Commission.]

Before the Railroad Commission of Oregon.

No. 89.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

Now on the 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the

Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the Laws of Oregon for the year 1907.

The plaintiff appears by Giltner and Sewall, its attorneys, and the defendant appears by Fred'k V. Holman and Franklin T. Griffith, its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

67 First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the locality of and town of Milwaukee."

Second, by adding to Paragraph 5 of the said findings and order the following, to-wit: "and unjustly discriminatory against the locality of and town of Milwaukee."

In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of this action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

That the defendant have and recover of and from the plaintiff the costs and disbursements herein taxed at $98.00.

That the injunction heretofore issued in this cause be and the same is hereby dissolved.

Plaintiff at this time, by its attorney, Franklin T. Griffith, gives notice in open court that the plaintiff appeals from the above decree and from the whole thereof to the Supreme Court of the State of Oregon, which said appeal is hereby allowed.

68 Dated this 22d day of June, A. D., 1908.

WM. GALLOWAY,
Judge of the Third Judicial District of the State of Oregon.

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And afterward, on the said 22d day of June, 1908, the following

Order of Court Staying Proceedings

was duly made and entered of record, viz:

(Title.)

This matter coming on to be heard this 22 day of June, 1908, plaintiff appearing by Frederick V. Holman and Franklin T. Griffith, its attorneys, and the defendant appearing by A. M. Crawford, Attorney General, Giltner & Sewall and C. B. Aitchison, its attorneys, and the court having heretofore, on this day rendered its certain decree in the above entitled suit dismissing the complaint of plaintiff and sustaining the amended order of the defendant complained of in said suit and plaintiff having, by its said attorneys, at the time said decree was made given notice in open court that plaintiff appeals from such decree and the whole thereof, to the Supreme Court of the State of Oregon, and which notice of appeal has been duly entered in the Journal of this court and plaintiff having applied for an order of this court directing that the operation of the amended order of said defendant complained of in the above entitled suit, be suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon, and it appearing to the court that said application of plaintiff should be granted, now, therefore, it is Ordered,

That the operation of the order of the said defendant dated the 30th day of January, 1908, as amended by said defendant on the 11th day of April, 1908, wherein said defendant ordered and required the said plaintiff to desist in certain practices and to put into effect certain rates in said amended order specified, which are as follows:

"It is therefore Ordered, Considered and Determined, that
69 the Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendand shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

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"It is further Ordered, Considered and Determined that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Be stayed and suspended until the final determination of this cause in the Supreme Court of the State of Oregon upon condition that the said plaintiff shall, within ten days from the date hereof,
70 make and execute a bond herein in the sum of Five Thousand ($5,000.00) Dollars as by law required, in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such cases made and provided, to be approved by this court. And it is further ordered,

That from and after the filing and approval of said bond as aforesaid, the operation of said order of said defendant as amended be, and the same is hereby, suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon. And it is further Ordered,

That pending said appeal said plaintiff shall continue to issue to each person traveling as a passenger upon its said Oregon City Division between the station of Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction and paying a cash fare thereof of ten cents, a receipt or other evidence to the effect that five cents of said ten cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said plaintiff, should the decree of this court in said cause be affirmed upon said appeal.

Dated June 22, 1908.

WM. GALLOWAY, *Judge.*

71 And afterward, on the said 22d day of June, 1908, the said plaintiff duly filed with the clerk of the said court, its

Undertaking on Appeal

in words and figures as follows:

(Title.)

Whereas the plaintiff in the above entitled suit has appealed to the Supreme Court of the State of Oregon from a judgment order and decree made and entered against the plaintiff in said suit, in the said Circuit Court, in favor of the defendant in said suit, on the 22d day of June, 1908, for the sum of $10.00, costs and disbursements of

suit, dismissing the complaint of plaintiff and sustaining that certain order of the defendant made and rendered on the 30th day of January, 1908, as amended by the defendant on the 11th day of April, 1908, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore Ordered, Considered and Determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: five cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

72 "It is further Ordered, Considered and Determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

And whereas, by order of the above entitled court duly made and entered therein on the 22 day of June, 1908, the operation of said order of said defendant dated January 30, 1908, as amended April 11, 1908, is directed to be stayed and suspended pending the appeal of plaintiff from said decree to the supreme court of the state of Oregon, upon plaintiff giving bond with sufficient surety, to be approved by the above entitled court in the sum of Five Thousand ($5,000.00) Dollars and conditioned as provided by law.

Now, Therefore, We, Portland Railway Light and Power Company, as principal, and American Surety Company of New York as surety, in consideration of the premises and of such appeal and of the suspending and staying of the operation of the said order of the said defendant dated January 30, 1908, as amended April 11, 1908, do hereby jointly and severally undertake and promise, on the part of the appellant, that if said decree appealed from, or any part thereof, be affirmed, the appellant shall pay and satisfy the amount

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directed to be paid thereby and all damages, costs and disbursements which may be awarded against the appellant on the appeal.

And said Portland Railway Light and Power Company as principal and American Surety Company of New York as surety, in consideration of the suspending and staying of the operation of said order of said defendant as amended, pending the said appeal, do
73 jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said decree shall be affirmed, the said appellant shall answer for all damages caused by the delay in the enforcement of the said order of the said defendant as amended, as aforesaid, and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said defendant as amended, as aforesaid, had not been stayed and suspended during the period transpiring from the time of taking said appeal until the final determination of said suit in the said Supreme Court, not exceeding the sum of Five Thousand ($5,000.00) Dollars, as it or they may sustain by reason of said appeal.

Dated this 22 day of June, 1908.

PORTLAND RAILWAY LIGHT AND POWER, COMPANY,
By FRANKLIN T. GRIFFITH, *Its Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By HOMER H. SMITH, *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Asst. Secretary. [SEAL.]

STATE OF OREGON,
County of Marion, ss:

Due service of the within undertaking is hereby accepted in Marion County, Oregon, this 22 day of June, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith, of attorneys for plaintiff.

A. M. CRAWFORD,
Of Attorneys for Def't.

Endorsed: "Approved June 22, 1908. Wm. Galloway, Judge."

SE IN CENTER

74 In the Circuit Court of the State of Oregon for the County of Marion.

No. 8962, Milwaukee Case.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

This matter coming on to be heard, plaintiff appearing by Franklin T. Griffith, Esq., of counsel, and it appearing to the Court that heretofore on the 22d day of June, 1908, upon motion of plaintiff, an order was duly made in this court allowing plaintiff until the 22d day of August, 1908, in which to file its transcript on appeal herein in the Supreme Court of the State of Oregon, and it further appearing to the court that the clerk of this court has failed to enter the said order upon the Journal of this court, now upon motion of plaintiff,

It is ordered that plaintiff be allowed until the 22d day of August, 1908, in which to file its transcript on appeal in this cause in the Supreme Court of the State of Oregon, And it is further

Ordered that this order be entered nunc pro tunc as of the 22d day of June, 1908.

Dated August 17, 1908.

WM. GALLOWAY, *Judge.*

75 In the Circuit Court of the State of Oregon for the County of Marion.

STATE OF OREGON,
County of Marion, ss:

I, R. D. Allen, Clerk of the Circuit Court of the State of Oregon, for the County of Marion, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries, constituting the judgment roll, together with notice of appeal (embodied in the final order) and undertaking on appeal and proof of service thereof, in the case of

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff and Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Defendant and Respondent,

have by me been compared with the originals thereof, and that they are true and correct copies of such original pleadings, papers, orders and journal entries and of said Notice of Appeal (embodied in said final order) and of said Undertaking on Appeal and proof of service thereof, and as the same appear of record and on file at my office and in my custody.

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In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 12th day of August, A. D. 1908.

R. D. ALLEN,
Clerk of the Circuit Court in and for the County of Marion, State of Oregon.

76 Endorsed: "Milwaukee Case" No. 8962. In the Circuit Court of the State of Oregon, for the County of Marion. Department No. 2. Portland Railway Light & Power Company, Plaintiff, vs. Railroad Commission of Oregon, Defendant. Transcript on Appeal. Filed Aug. 22, 1908. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy.

77 In the Circuit Court of the State of Oregon for the County of Marion.

Case No. 6967, Drawer No. 6968.
652.

Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
v.
PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Proceedings.

Filed March 12th, 1908. R. D. Allen, Clerk, by Bertha L. Allen.

P. R., L. & P. Co. Ex. 8.

78 Before the Railroad Commission of Oregon.

Present: Thos. K. Campbell, Chairman, Oswald West, and Clyde B. Aitchison, Commissioners; Geo. O. Goodall, Secretary.

No. 89.

THE TOWN OF MILWAUKEE, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Be it remembered: That the following proceedings were had before the Railroad Commission of Oregon in the above entitled matter, to-wit:

On, to-wit, the 15th day of August, 1907, the plaintiff, the Town of Milwaukee, files its complaint herein in words and figures following, to-wit:

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79 (Copy.)

Before the Railroad Commission of Oregon.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

The above named plaintiff, the Town of Milwaukee, respectfully shows:

1. That the plaintiff is a municipal corporation duly incorporated, organized under and existing by virtue of the laws of the state of Oregon. That Milwaukee has a population of 500.

2. That the above named defendant, Portland Railway Light and Power Co. is a corporation duly incorporated, organized under and existing by virtue of the laws of the state of Oregon, and is a common carrier, engaged in the transportation of persons and property by an electric interurban railroad between points in the state of Oregon, and that as such common carrier, said defendant is subject to the provisions of Chapter 53, Laws of Oregon for the year 1907.

3. That the said defendant, successors to the Oregon Water Power and Railway Co. charge a ten cent fare between Portland and Milwaukee a distance of about six miles, which is unjust and discriminatory when compared to the fares charged between other points on its said line, and which fare should be reduced to five cents.

4. That the said defendant charges a five cent fare from Portland, to the Golf Links in Clackamas County and an extra five cents fare from the Golf Links to Milwaukee, the distance between the last two named points being less than a mile, which is unreasonable and unjustly discriminatory when compared to the fares charged between other points on its said line, and a great number
80 of people who would otherwise reside in Milwaukee are kept away, because they are compelled to pay an extra five cent fare in going from the Golf Links to Milwaukee from Portland, and a ten cent fare from Portland to Milwaukee.

5. A passenger can take a car on the corner of Second and Washington streets in the city of Portland and ride to Ida Street which is the boundary line between the city of Portland and the city of St. Johns and ride from the said boundary line to St. Johns proper, a distance of about a mile and a quarter for one fare of five cents.

6. A passenger can get on at Lents, ride to the city limits of Portland (which is about four miles) and from there to St. Johns for one fare of five cents, a distance of about sixteen miles.

7. A passenger can ride from any point in Portland to the Golf Links which is the city limits, thence to Nickum Station, which is the same distance easterly from the Golf Links that Milwaukee is southerly therefrom, for one fare, five cents, whereas from any point in Portland to Milwaukee two fares or ten cents are exacted.

8. That Mr. F. I. Fuller, who is vice president of the defendant company, and who was general manager and superintendent of the

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Oregon Water Power and Railway Co., has for a long time and repeatedly promised the people of Milwaukee that he would correct this unjust and unreasonable discrimination against the town of Milwaukee and grant a five cent fare from Portland to Milwaukee but he has neglected to keep his promise.

Wherefore, Plaintiff prays that the defendant be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violation of the said chapter 53, Laws of Oregon for the year 1907; and that the Commission shall fix and order substituted a five cent rate or fare from any point in the city of Portland to the town of Milwaukee, or such fare as it shall determine
81 to be just and reasonable, and which shall be charged, imposed and followed in the future, in lieu of that found to be unreasonable or unjustly discriminatory; and for such other and further order as the Commission may deem just and necessary in the premises.

Dated at Milwaukee, Clackamas County, Oregon, this 14th day of August, 1907.

(Signed) THE TOWN OF MILWAUKEE,
By WM. SCHINDLER.

GILTNER & SEWALL,
Att'ys for Pl't'f.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Aug. 15, 1907. E. G. Miller, Acting Secretary.

82 On August 15th, 1907, the Railroad Commission of Oregon caused to be issued a notice that complaint has been made to the defendant, Portland Railway Light and Power Company, which complaint is in the words and figures following, and service of which is duly accepted by said defendant on August 16th, 1907, as appears by acceptance of service upon said notice.

83 Before the Railroad Commission of Oregon.

No. 89.

THE TOWN OF MILWAUKEE, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT & POWER COMPANY, Defendant.

Notice to Defendant That Complaint Has Been Made.

To the above named Defendant:

Please take notice that the above named plaintiff has made complaint to the Railroad Commission of Oregon, a certified copy of which complaint is herewith served upon you, and is made a part hereof. If you desire to make any answer to said complaint, the same should be filed within ten days from the date of service hereof.

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After the expiration of ten days from the date of service hereof, said Commission will proceed to investigate the matters and things set forth in the said complaint.

Dated this 15th day of August, 1907.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOS. K. CAMPBELL,
" OSWALD WEST,
" CLYDE B. AITCHISON,
Commissioners.

Attest:
E. G. MILLER,
Acting Secretary.

Due and legal service of the foregoing notice is hereby accepted, and a certified copy of said complaint received this 16th day of August, 1907.

(Signed) PORTLAND RAILWAY, L'T & POWER CO., *Defendant,*
(Signed) By F. I. FULLER, *Vice Pres.*

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Aug. 22, 1907. E. G. Miller, Acting Secretary.

84 And afterwards, on, to-wit, the 22d day of August, 1907, the said notice that complaint has been made, together with the defendant's acceptance of service thereof, were returned to the said Commission and were duly filed.

And on, to-wit, August 28th, 1907, the defendant filed its answer herein in words and figures following, to-wit:

85 (Copy.)

Before the Railroad Commission of Oregon.

No. 89.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Comes the above named defendant and makes answer to this Honorable Commission, to the complaint herein filed against it on August 15th, 1907, as follows:

I.

This defendant admits all of paragraphs 1, 2, 5 and 6 of the complaint, except defendant denies that Lents is any greater distance than three miles outside the city limits of Portland, Oregon.

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II.

Defendant admits that it charges a ten cent fare between Milwaukee and Portland, and denies that the same is unjust or discriminatory or that it should be reduced to five cents or to any sum less than ten cents.

III.

Defendant admits that it charges a five cent fare to Golf Links Station, but denies that Golf Links Station is in Clackamas County; and admits that it charges an extra five cents from Golf Links to Milwaukee, but denies that the distance between Golf Links to Milwaukee is less than one mile or less than one and 35/100 miles, and denies that such charge is unreasonable or unjustly or at all discriminatory when compared to the fees charged between other points on its said line, or otherwise or at all.

IV.

Denies that Nickum station is the same distance easterly from Golf Links at Milwaukee is southerly, but alleges that Nickum Station is one-half mile easterly from the city boundary of the city of Portland and that Milwaukee is one and 35/100 miles southerly from the said city boundary.

86

V.

Denies all of paragraph 8 of said complaint.

Further answering in respect to the charge of exacting an unreasonable and unjust fare in said complaint, this defendant alleges:

I.

That the line of railway operated by defendant is partly within and partly outside the city limits of the city of Portland, Oregon:

That the distance from this defendant's terminal in said city of Portland to the town of Milwaukee is 6 and 35/100 miles, and to Island Station 6 and 69/100 miles, of which five miles is within the city limits and 1 and 35/100 and 1 and 69/100 miles, respectively, are outside of said city.

That the station called Golf Links is just at the city boundary of said city of Portland, which boundary is the line between Clackamas and Multnomah Counties, state of Oregon.

That within the said city of Portland, over which this Honorable Commission has no jurisdiction, by virtue of the ordinances of said city and the charter and franchises of this defendant therein, a flat rate of not more than five cents for one continuous trip in one general direction between any two points within said city is provided for, so that this defendant is compelled by law to carry pas-

sengers from the terminal of its line in the center of the city of Portland to Golf Links in the southern boundary of said city for five cents. The town of Milwaukee is 1 and 35/100 miles further south, and Island Station, which is the farthest point south that defendant carries passengers for a ten cent fare, is 1 and 69/100 miles south of said city boundary.

A ten cent fare from Milwaukee to Portland, a distance of 6 and 35/100 miles, is at the rate of 1.57 cents a mile, which defendant alleges to be an extremely low rate.

A ten cent fare from Island station, a distance of 6 and 69/100 miles to Portland, is at the rate of 1.48 cents per mile, which defendant alleges to be an excessively low rate.

87 This Honorable Commission has no jurisdiction to fix a rate of fare or charge such rates within the city of Portland, nor has your Honorable Commission jurisdiction to require this defendant to carry passengers any distance free of charge. This defendant therefore says that if plaintiff's complaint were granted this defendant would be compelled to carry passengers 1 and 35/100 miles for nothing.

II.

This defendant further alleges that the lowest denomination of money in common currency and circulation is the sum of five cents and a rate of street car fare which is of a sum not divisible by five would be cumbersome and entail an endless lot of trouble and annoyance to this defendant and to the travelling public.

It is impracticable to maintain offices at every street corner for the sale of tickets and fare must therefore be collected upon the cars and it is impracticable to provide change in lower denominations than five cents and there is no standard register of fares upon which it is practicable to register fares in different denominations than sums divisible by five.

The establishment of any cash rate of fare greater than five cents and less than ten cents between Milwaukee and Portland is impracticable and would work a great hardship upon this defendant and would greatly inconvenience and annoy the travelling public.

And this defendant alleges that this defendant has established a rate of seven cents between Milwaukee and Portland by commutation ticket. A book containing twenty tickets can be purchased from defendant entitling the holder thereof to twenty rides between Portland and Milwaukee for the sum of $1.40, and thus the rate of seven cents can be procured without the inconvenience and annoyance above referred to, and these tickets can be used by the holder to pay his own fare or the fare of anyone else travelling with him.

This defendant has thus completely answered the charge of exacting an unreasonable and unjust fare, and further asserts that the fare exacted is both reasonable and just.

88 Defendant further answering said complaint in respect to the charge of discrimination alleges:

I.

This defendant does not own or operate the line of street cars running between the corner of Second and Washington Streets, Portland, Oregon, and the city of St. Johns referred to in the fifth paragraph of the complaint, but the same is owned and operated by the Portland Railway Company. That said line is entirely within the *the* municipal corporations of the city of St. Johns and the city of Portland, and the rate of fare charged thereon is governed by the franchises of said company and by the ordinances and laws of said cities and of the state of Oregon, and is being operated at a loss by said company. This defendant further says that this Honorable Commission has no jurisdiction as to the rate of fare charged upon said Portland-St. Johns line of street cars and the charge of a five cent fare upon said line, even if owned and operated by defendant, would be no discrimination against the people of Milwaukee because the said fare is regulated by the said municipal corporations and the said state law.

In regard to the fact that a passenger can, for a five cent fare, ride from Lents to St. Johns, this defendant alleges that said fact constitutes no discrimination against the people of Milwaukee, for the reason that all that portion of said ride from St. Johns to a point within three miles of Lents is within the corporate limits of the said municipal corporations and the fares thereon regulated by them and the laws of the state of Oregon. And in regard to the portion of said ride from the city limits of Portland to Lents, a distance of about 3 miles, this defendant alleges: That the track and right of way of said line from Hawthorne Avenue and about East Forty-eighth Street to Lents, a distance of about 4 miles, was constructed and owned by the Portland, Chicago & Mt. Scott Railway Company, the majority of whose stock was owned by the citizens, inhabitants and property owners of the town of Lents and that vicinity. That heretofore the said owners of said stock and said line of railway sold and delivered the same to the predecessors of the Oregon Water Power and Railway Company, the predecessor of this de-
89 fendant, and at the time of said sale and as the consideration thereof it was agreed that no more than a five cent fare should be charged by said predecessor of the Oregon Water Power and Railway Company or its successors or assigns from the city of Portland to the town of Lents and from the town of Lents to the city of Portland. And this defendant alleges, referring to paragraph six of said complaint, that this defendant and its predecessors were paid a substantial and valuable consideration, to-wit: the said line of railway itself, for maintaining a five cent fare and that such fare is not a discrimination against the people of Milwaukee.

This defendant further alleges that the charge of a five cent fare from Portland to Nickum Station is not a discrimination against the people of Milwaukee. That said Nickum Station is situated upon defendant's Cazadero line, upon which defendant runs trains which stop only at stations and not at every cross street. That Nickum is one-half mile east of the city boundary of the city of Portland; and

the last stopping station on defendant's line of railroad before reaching Nickum Station is Golf Links, which is about as far inside the city limits of the city of Portland as Nickum Station is outside thereof on said line. Under the ordinances of the city of Portland and the laws of Oregon this defendant can charge no more than a flat rate of five cents to any point upon its line within the city of Portland. A passenger on one of defendant's trains going in the direction of Cazadero would be lawfully entitled, for a five cent fare, to go beyond Golf Links and up to the city boundary. The next stopping place beyond Golf Links is Nickum Station, and defendant has made it the limit of its five cent fares in order to avoid stopping its trains at the city boundary.

And defendant respectfully submits that the making of Nickum Station, under the circumstances aforesaid, the limit of the five cent car fares does not constitute a discrimination against the people of Milwaukee.

90 And now having fully answered the said complaint and having alleged the facts sufficient to show that the present rate of fare between Milwaukee and Portland is neither unreasonable nor unjust and is not a discrimination against the people of Milwaukee in favor of any one else, this defendant prays that the complaint be dismissed and this defendant go hence.

(Signed) PORTLAND RAILWAY LIGHT & POWER COMPANY,
By E. B. SEABROOK, *Attorney, Defendant.*

(Signed) DAN J. MALARKEY,
E. B. SEABROOK,
Attorneys for Defendant.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Aug 28, 1907. Geo. O. Goodall, Secretary.

91 And on, to-wit, September 9th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

Ordered: That on the 24th day of September, 1907, at 10:00 o'clock in the forenoon of the said day at the Newmarket Building in Portland, Oregon, the Railroad Commission of Oregon will proceed to investigate the above named cases, Nos. 89, 93 and 94 and will consider and determine such matters and make such order or orders as may be proper in the premises.

And on, to-wit, September 12th, 1907, the said commission caused ten days' notice of the time and place and when and where such matters would be considered and determined to be given to the defendant railroad and the plaintiff in words and figures following, due and legal service of which was accepted by both plaintiff and defendant as appears by the acceptance of service annexed to the said notice, to-wit:

92 Before the Railroad Commission of Oregon.

No. 89.

TOWN OF MILWAUKEE, Plaintiff,
v.
PORTLAND RAILWAY LIGHT & POWER COMPANY, a Corporation, Defendant.

Notice of Hearing.

(Copy.)

Notice of Time and Place of Hearing.

To the above named Plaintiff and Defendant:

Whereas, the above named plaintiff has heretofore filed with the Railroad Commission of Oregon a complaint, among other things alleging,

That the above named defendant charges a ten cent fare between Portland and Milwaukee, a distance of about six miles, which is unjust and discriminatory when compared to the fares charged between other points on defendant's line; that the said defendant charges a five cent fare from Portland to the Golf Links in Clackamas County and an extra five cents from the Golf Links to Milwaukee, the distance between the two last named points being less than a mile, which is unreasonable and discriminatory when compared to the fares charged between other points on its line, and a great number of people who would otherwise reside in Milwaukee are kept away because they are compelled to pay an extra five cent fare in getting from the Golf Links to Milwaukee and a ten cent fare from Portland to Milwaukee. That a passenger can ride from any point in Portland to the Golf Links, which is the city limits, thence to Nickum Station, which is the same distance easterly from the Golf Links that Milwaukee is southerly therefrom, for one five cent fare, whereas from any point in Portland to Milwaukee two fares, or ten cents, are exacted.

And praying that said Railroad Commission of Oregon shall fix and order substituted a five cent rate or fare from any point in the city of Portland to the town of Milwaukee, or such fare as it shall determine to be just and reasonable; and for such other and further order as the commission may deem just and necessary in the premises.

And whereas, the undersigned commission did on the sixteenth day of August, 1907, serve the said defendant a copy of said complaint, together with a notice that the same had been filed, and that after the expiration of ten days from the date of service thereof said commission would proceed to investigate the matters and things set forth in said complaint:

And whereas, more than ten days have elapsed since said com-

plaint and the accompanying notice were served on the said defendant, and said defendant has answered thereto.

Now, therefore, notice is hereby given that on the 24th day
93 of September, 1907, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as the parties can be heard, at the Newmarket Building in the city of Portland, Oregon, the undersigned Railroad Commission of Oregon will proceed to investigate the aforesaid complaint and consider and determine such matters and make such order or orders as may be proper in the premises, at which time and place you will be entitled to be present, to be heard, and to have process to enforce the attendance of witnesses.

Dated this 12th day of September, 1907.

(Signed) RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
C. B. AITCHISON,
OSWALD WEST,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

94 (Copy.)

Due and legal service of the above and foregoing notice is hereby accepted, and a copy thereof received, this 13th day of September, 1907.

(Signed) PORTLAND RAILWAY LIGHT AND POWER COMPANY, *Defendant,*
" By F. I. FULLER, *Vice-Pres.*

Endorsed on back as follows: Railroad Commission of Oregon. Filed Sep. 14, 1907. Geo. O. Goodall, Secretary.

95 And on September 19th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

"Now on this 19th day of September, 1907, defendant in the above entitled case files a motion for continuance, and said motion is resisted by plaintiff; and same having been considered by the commission it is Ordered that the motion for continuance be and the same is hereby sustained, and the above entitled case be continued and be set for hearing on Monday, the 28th day of October, 1907, at one o'clock in the afternoon of said day, at the Newmarket Building, in Portland, Oregon."

And on, to-wit, October 28th, 1907, this matter comes on to be heard before the Railroad Commission of Oregon, pursuant to the order of said commission of September 19th, 1907. The plaintiff appears by Wm. Schindler, Esq., its Mayor, and Giltner & Sewall, its attorneys. The defendant appears by F. I. Fuller, Esq., its Vice President, and C. J. Malarkey, Esq., and E. B. Seabrook, Esq., its attorneys.

It was agreed by the parties hereto that the facts in this case are as set forth in the complaint and answer (except with regard to the distance between two certain points). The commission thereupon allowed plaintiffs fifteen (15) days to prepare and submit a brief; defendant twenty (20) days in which to answer plaintiff's brief; and plaintiffs ten (10) days in which to answer defendant's brief.

Hearing in this matter was then adjourned.

96 And on, to-wit, January 3d, 1908, the Railroad Commission of Oregon entered the following order:

Before the Railroad Commission of Oregon.

No. 89.

TOWN OF MILWAUKEE, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER CO., Defendant.

(Copy.)

Ordered: That the above named case be set for argument on January 14, 1908, at 1 o'clock P. M., at the office of the Railroad Commission of Oregon, in the Capitol at Salem, Oregon.

(Signed) RAILROAD COMMISSION OF OREGON,
" By THOS. K. CAMPBELL,
" OSWALD WEST,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

I dissent from so much of the foregoing order as fixes Salem as the place of hearing.

(Signed) CLYDE B. AITCHISON,
Commissioner.

97 And on, to-wit, January 13th, 1908, the said Commission entered the following order, to-wit:

Ordered: That the date for hearing arguments in the above entitled cases, heretofore set for January 14, 1908, at Salem, Oregon, be changed to January 17th, 1908, at 2 P. M., at Room 14, Newmarket Building, Portland, Oregon.

And on the said 13th day of January, 1908, the counsel for plaintiff and defendant were duly notified orally of the time and place when and where said argument would be had.

And on to-wit January 17, 1908, the above entitled matter was fully argued by counsel and submitted.

And on January 30th, 1908, the said commission duly made and entered the following findings and order, to-wit:

98 Before the Railroad Commission of Oregon.

No. 89, F. 18.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Order.

Now on this 30th day of January, 1908, this matter comes on before the above named commission for final determination and order, having heretofore been fully submitted, and the commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the city of Portland, and Canemah, Clackamas County, Oregon (known as the Oregon City Division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the city of Portland, Oregon.

(2) That the plaintiff is a municipal corporation of the state of Oregon situated on the defendant's Oregon City Division.

(3) That the said defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within city of Portland)	5.36	miles	5 cents.
Lambert	5.93	"	10 "
Knight	6.29	"	10 "
Hendee	6.44	"	10 "
Milwaukee	6.71	"	10 "
Island	7.05	"	10 "
Milwaukee Heights	7.70	"	15 "
Courtney	8.30	"	15 "
Oak Grove	8.48	"	15 "
Center	8.68	"	15 "
Risley	9.26	"	15 "

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On Mt. Scott Division.

Reservoir (within City of Portland)	4.69	miles	5 cents.
Lents	7.69	"	5 "
Lents Junction	8.31	"	10 "

On Springwater Division.

Golf Junction (within city of Portland)	5.35	miles	5 cents.
Nickum	6.51	"	5 "
Kerrigan	7.26	"	10 "
Bell	8.51	"	10 "
Kendall	9.32	"	10 "
Lents Junction	10.71	"	10 "
Gilbert	11.65	"	10 "
Gates	12.38	"	10 "
Wilson	13.00	"	15 "
Sycamore	13.48	"	15 "
Jenne	14.43	"	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5 cents.
Knight	.93	"	5 "
Hendee	1.08	"	5 "
Milwaukee	1.35	"	5 "
Island	1.69	"	5 "
Milwaukee Heights	2.34	"	10 "
Courtney	2.94	"	10 "
Oak Grove	3.12	"	10 "
Center	3.32	"	10 "
Risley	3.90	"	10 "

On Springwater Division.

Nickum	1.15	miles	5 cents.
Kerrigan	1.90	"	5 "
Bell	3.15	"	5 "
Kendall	3.96	"	5 "
Lents Junction	5.35	"	5 "
Gilbert	6.29	"	10 "
Gates	7.02	"	10 "
Wilson	7.64	"	10 "
Sycamore	8.12	"	10 "
Jenne	9.07	"	10 "

(4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets

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in the city of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater division of the defendant's railroad are unjustly discriminatory against the inhabitants of the town of Milwaukee who travel between Milwaukee and said First and Alder Streets.

(5) The commission further finds that from points on the
100 Mount Scott division without the city of Portland the defendant furnishes to passengers who pay fare to First and Adler Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the inhabitants of the town of Milwaukee when traveling and paying fare from Milwaukee over the defendant's line of railroad to First and Alder Streets in the city of Portland, Oregon. The commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the inhabitants of the town of Milwaukee.

(6) The commission further finds that the existing fares and charges of the defendant between Milwaukee and First and Alder Streets in the city of Portland, Oregon, to-wit: the sum of ten cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the city of Portland and Milwaukee would be the sum of five cents.

It is therefore Ordered, Considered and Determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee and First and Alder Streets in the city of Portland, Oregon, in either direction the rate, fare and charge set out in its Tariff O. R. C. No. 1, viz: ten cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz.: five cents.

It is Further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee and First and Alder Streets in the city of Portland, Oregon, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, in either direction, and that the said defendant shall furnish to all persons who shall
101 pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further Ordered, Considered and Determined, that the said rate so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty

days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rate and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL, *Secretary.*

A true copy:
GEO. O. GOODALL, *Secretary.*

102 And on February 1, 1908, the defendant, Portland Railway, Light and Power Company duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 89, F. 18.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

(Copy.)

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) DAN J. MALARKEY,
Attorney for P. R. L. and P. Co.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Feb. 7, 1908. Geo. O. Goodall, Secretary.

103 And on February 1, 1908, the plaintiff the Town of Milwaukee duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 89, F. 18.

THE TOWN OF MILWAUKEE, a Municipal Corporation, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) R. R. GILTNER,
Attorney for Plaintiff.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Feb. 3, 1908. Geo. O. Goodall, Secretary.

104 Before the Railroad Commission of Oregon.

No. 89.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
vs.
THE PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

And now on this 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907.

The plaintiff appears by Giltner & Sewall, its attorneys and the defendant appears by Fred'k V. Holman and Franklin T. Griffith its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the locality and town of Milwaukee.

Second, by adding to Paragraph 5 of the said findings and order

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the following, to-wit: "and unjustly discriminatory against the locality and town of Milwaukee.

105 In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order, is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of its action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

106 STATE OF OREGON,
County of Marion, ss:

We, Thos. K. Campbell, Oswald West and Clyde B. Aitchison the members and commissioners of the Railroad Commission of Oregon do hereby certify that the foregoing is a true and correct transcript of all proceedings had in the above entitled matter.

And we hereby certify that the transcript of testimony certified to by F. Roy Davis, Official Stenographer of the said Railroad Commission of Oregon, is a full, true and correct transcript of the testimony taken upon the investigation made in the above entitled matter, which said transcript is hereby made a part hereof

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
E. G. MILLER,
[SEAL.] *Acting Secretary.*

107 Before the Railroad Commission of Oregon.

Nos. 89 and 93.

TOWN OF MILWAUKEE, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Evidence.

At the hearing of the above entitled matter before the Railroad Commission of Oregon, begun at the hour of 10:00 o'clock in the

forenoon on the 28th day of October, 1907, in Room 14 at Number 7 First Street in the city of Portland, Oregon, the following evidence was offered and received, and the following proceedings were had, to-wit:

Present: The Chairman, Thos. K. Campbell, and Commissioners Oswald West and Clyde B. Aitchison, and the Stenographer, F. Roy Davis.

The said Portland Railway Light and Power Company appears by Mr. F. I. Fuller, Vice President and its attorneys Dan J. Malarkey and E. B. Seabrook.

The said town of Milwaukee appears by Wm. Schindler, Mayor and Giltner & Sewall, attorneys.

Mr. AITCHISON: Do you have any wish as to which case shall be taken up first, senator?

Mr. MALARKEY: No, anything is satisfactory to us, except that it appears to me that I do not really see where there is much issue of facts in these cases. I think, particularly as far as these complaints as to fares are concerned, we practically agree upon what the facts are. I see no good to be subserved by the taking of testimony; the facts are practically agreed upon.

Mr. AITCHISON: How would it do to take up those where there seems to be an issue and let the remainder stand as agreed?

Mr. MALARKEY: I think that would be really better and there would be no good in examining witnesses. I think that complaint as to freight would be the only controversy.

Mr. AITCHISON: Perhaps counsel might be able to arrive at a stipulation as to the facts of five and ten cent fare cases.

108 Mr. MALARKEY: I think we are practically agreed.

Mr. GILTNER: Our people claim there is some difference of distance as represented by the defendants in this case, but I do not think that would amount to very much—only about one-eighth of a mile in the difference—so that we can agree upon that in regard to the rate in case 89.

Mr. MALARKEY: May I suggest that inasmuch as Mr. Wright has not yet appeared it might be best to proceed with the freight facility case first and meanwhile Mr. Wright will appear.

Mr. PAGET: I understood from Mr. Wright, our attorney, that mutual arrangements can be made between he and some of the other cases that the Milwaukee case may be heard first as our witnesses may be here only at three. That is one reason why Mr. Wright is not here now.

Mr. AITCHISON: Take up the freight facility case now—No. 93.

Mr. GILTNER: In order to get this matter before the commission, a complaint containing numerous allegations had been brought to its attention by our clients, and I will begin reading with section 3: Section 3 reads as follows:

"That the said defendant is a common carrier of goods to and from said town; that its freight trains or cars make two trips each way per day; that it has no agent at Milwaukee; that goods are accepted for shipment only at owners' risk after unloading; prepayment of freight is required except in special instances; and

the minimum charge for shipment is 25 cents; goods are dumped off of the cars into the public street without any care, and perishable and imperishable goods are so unloaded and in the most inclement weather without any cover or protection or notice to the owners thereof; that the freight service is slow, uncertain and unreliable and consignees are unable to determine when goods will arrive so that they can be taken care of; that there is no system maintained whereby lost goods can be promptly traced; that no facilities
109 are provided by said company whereby goods can be shipped from said town except by delivering goods can be shipped of the freight train or car of said company, and the time of the arrival of said train or car is uncertain; that one of the stopping places at Milwaukee is not provided with shelter for passengers, and that this point is in a really dangerous condition owing to the fact that a few planks set in the ground are uneven and that the cars sometimes run on to the bridge, compelling the passengers to get off on the ties.

Four main and well traveled roads converge at Milwaukee and nearly all wagon travel from the country south of Portland, on the east side of the Willamette river passes through Milwaukee. An adequate freight service at this point would benefit the citizens of Milwaukee and a large number of farmers, fruit raisers and dairymen; that a freight shed with a capacity of two or three tons of freight, should be built for the accommodation of freight consigned to Milwaukee; and that said freight shed should be built in connection with a small passenger depot, at the street above referred to; in this connection the town of Milwaukee will permit the erection of such shed and depot in said street."

As this juncture I would state to the commissioners that the defense set up here by defendants is to the effect that this branch or track of railroad runs through the town of Milwaukee on the county road and that it would not be lawful for them to build a freight shed or depot there, but I think under the supreme court decisions and under the charter of the town of Milwaukee that any county road that the city has jurisdiction over that county road where it becomes a street, and that they have a right to that street so long as they do not block it, and that a freight shed could be built and there would be no complaint made; that if this were done the freight receipts would be trebled; that the aforesaid is unreasonable by reason of the foregoing matters. Then follows our demand. The
110 defendant in this case sets up this:

"Admits all of paragraphs 1 and 2."

I will state in this connection, however, that the town of Milwaukee—their council has not passed upon that question, as to whether or not they will give them a site there, and I understand from the Mayor that he has had talks with the council and they will give a site to build a shed upon.

Mr. MALARKEY: Yes sir; I do not see anything to try. We want something tangible.

Mr. GILTNER: We have stated so and so.

Mr. AITCHISON: If the only question there is as to whether or not

the site can be furnished lawfully, would you have any difficulty as to arriving at the character of the accommodations that could be put up?

Mr. MALARKEY: This defendant, I might say, is willing, though the freight business to and from Milwaukee does not justify any—this defendant is willing, however, to put up a shed. This complaint recites that they offered a site to put up a shed in what we say is the county road.

Mr. AITCHISON: Senator, under the charter of the city of Portland it gives the city jurisdiction of all county roads entering the city limits.

Mr. MALARKEY: I do not know where there are any.

Mr. AITCHISON: I understood the Base Line Road is an instance.

Mr. MALARKEY: The Cornell Road is not a city street and it is within the city for a mile or more. At all events the counsel makes very broad statements at times that cannot be substantiated. I want to say furthermore that whether county road or street you can readily see that this defendant does not want to be put into the position of putting up a shed into any city street. Do you suppose the Mayor and Common Council can say to us that we have a right to put up one there? Suppose the counsel who is temporarily representing somebody with a grievance says so. What we do
111 say is that whenever a site is furnished us therefor we will erect a shed and it seems to me that this plaintiff, upon whom the burden of proof is, that when they come into court here and say they will furnish a site, why should the time of this commission and all the parties be taken up that at the end we give them what they ask for?

Mr. GILTNER: I will state in this connection, I do not know whether the commissioners have ever been in Milwaukee, but the county road occupies a certain well defined part of the road, and this shed could be built off on the side upon the flat between the road and the river, and yet not in a way where it will interfere with travel. And this the common council and mayor are satisfied with, and all we want is that they be put on record here before the commission and then the other question is a question of legality and law which we will take up.

Mr. AITCHISON: Just a minute. Would it be satisfactory to the parties that an order be made in the matter along the lines of the complaint and the answer and the statement of Senator Malarkey and conditioned upon a site being furnished?

Mr. MALARKEY: (Holding less than a carload of freight.)

Mr. SEABROOK: (The commissioners know that is very small at the most.)

Mr. MALARKEY: This is only a matter of a ton or two and we will not object to that, but the site for the shed is the point we want the commission to understand. In fact we will be willing when you will show to Mr. Aitchison that you can give us title or a right to the site that we will be justified to build upon the place you furnish and we will take Mr. Aitchison's pass upon it.

Mr. AITCHISON: I was about to make conditional upon a site

being furnished, within a certain time we will say. Then if the order is not complied with, then the question of a site could be threshed out in open court.

Mr. MALARKEY: We do not want to place ourselves in the
112 position of putting up a shed and then have to move it off. We will build upon a site when title to it is given to us or authority such as is approved by commissioner Aitchison.

Mr. GILTNER: As soon as title is given to them upon the property upon which they build. What the people intend to do there: They want to act fair with the railroad company; all they want is a convenient, safe and dry place to put their goods. Now, it is not going to cost very much money and I do not think Mr. Fuller would object to it. Mr. Fuller knows where the county road runs through the town of Milwaukee. It could be placed up there temporarily and if there is any kick made it could be moved off. Now, there is no use taking up time here. As counsel says, it can be placed where it can be moved away. There is no one going to take exception to it. Now, I think Mr. Fuller could have got together with these people and come to an understanding.

Mr. FULLER: We only want to know we have a right to put it there.

Mr. AITCHISON: Do you think you could get an order from the county court to put it there? I will tell you frankly, Senator, I am not going to pass upon it.

Mr. MALARKEY: I know that any reasonable man will understand that this railroad will not go and erect a shed and maybe this present administration might issue an order on the county court commanding us to take away the shed off the city street. I apprehend that any single citizen could do it. What I want to say is that we want title——

Mr. AITCHISON: Do you mean "title in fee?"

Mr. MALARKEY: We would not want a permit given that would be refutable tomorrow. We are paying for the erection of a shed so that when the cars go through freight can be held.

Mr. GILTNER: (Reads section 38 of Act, 23d Legislative Assembly re Milwaukee.) (City charter of Milwaukee.) It seems to me this section gives them power to do this.

Mr. AITCHISON: The Senator says he wants some degree of permaneney about the permit.

113 Mr. MALARKEY: We do not take it that the town of Milwaukee can do that.

Mr. GILTNER: I will *want* you that the freight depot put up there will be gone before fifteen years expire.

Mr. AITCHISON: Mr. Giltner, I would like to call your attention to the last paragraph of your complaint but one with reference to the dangerous condition of alighting place—lines 2, 3, 4 and 5 of page 2.

Mr. MALARKEY: Before you take up that matter, and in order that our position will appear clearly upon the records here, the defendant, Portland Railway Light and Power Company, now offers to submit to an order of this commission to erect at its expense a shed or building for the reception and protection of freight at Mil-

waukee of sufficient size to hold a carload of freight of the size of the cars operated by the defendant on its line running through Milwaukee upon such suitable and convenient site in Milwaukee as may be furnished by the town of Milwaukee or any of the citizens thereof, it being understood that before the order shall be made the necessary permit or authority or other instrument will give the defendant such site and to give the defendant the right to erect and maintain such freight shed thereon for not less than fifteen years, shall be in such form as to give the defendant the right to so erect and maintain such freight shed without interference on the part of any person shall be submitted to and approved by this commission, and it being further understood that in offering to submit to such an order this defendant does not in any way agree or bind itself to keep any freight agent at Milwaukee, the shed referred to being furnished for the accommodation of the shippers to and from Milwaukee and to be a place in which goods may be deposited by such shippers or by the company for consignees at Milwaukee at the risk of
114 such shippers or consignees. Now, that expresses just exactly what we are willing to do.

Mr. AITCHISON: How about the shelter for passengers?

Mr. MALARKEY: I do not know that that is involved. As far as passengers are concerned, these cars stop at every block.

Mr. GILTNER: They could build a little place in front of the freight shed about eight feet deep. Are you willing to do that, Mr. Fuller?

Mr. AITCHISON: Do you want to insist upon that?

Mr. MALARKEY: The cars stop at practically every block and there is no occasion to furnish a passenger depot at every block. We do not want to bind ourselves to maintain a passenger depot there. We cannot do that.

Mr. GILTNER: I do not think the company would object to it, in building a place for people to be kept in a shelter. This is not all for the convenience of the citizens of Milwaukee as the counsel would undertake to impress you with, but also for others. The railroad people received many privileges running through that city and never paid a quarter of a dollar for them, and then come before this commission saying, "We are doing this for them." I think it little becomes them and it is their duty to do that—they should do it; and I think there should be built a suitable place where the people can go and take the cars that come and go. It will not cost very much. Now, we accept the proposition made here by the defendant in this case in regard to this freight depot, but we do insist, and I think it is no more than right, that we should have a suitable place where the people can be kept dry when waiting for the cars. We are not asking for an extravagant depot, but only one that will keep your wife, or my wife, or some sick person who is waiting for a car, from the inclemency of the weather; and it is the duty of the railroad, and it is a small matter to quibble about.

Mr. AITCHISON: May I ask Mr. Fuller a question? You have shelters have you not, at various points on the Milwaukee lines?

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115 Mr. FULLER: We have some.

Mr. SCHINDLER: None built by the company.

Mr. FULLER: Milwaukee at the present time has fifteen minute service, or has a service such as no other point outside the city has.

Mr. AITCHISON: Now, at Firland, have you?

Mr. FULLER: I could not say; there may be shelters built by the people.

Mr. AITCHISON: What objection would you have in the order providing that this freight depot should be so built to afford shelter to passengers?

Mr. FULLER: It would be the same thing, it would furnish shelter for both freight and passengers.

Mr. GILTNER: You would not have them in the same room with the goods, would you, Mr. Fuller?

Mr. FULLER: I would not see any difference.

Mr. GILTNER: The freight ought to be locked up and not dumped off there; the freight might be protected in some way out there.

Mr. FULLER: We could not lock it up.

Mr. GILTNER: There might be a protection of some kind.

Mr. MALARKEY: We will not consent to any order of this commission requiring us to maintain a passenger depot. The first thing you know we will be up against a proposition to maintain lights and heat there.

Mr. AITCHISON: This commission's orders have never contemplated any light or heat being furnished except where an agent is maintained.

Mr. MALARKEY: I do not know anything about that.

Mr. GILTNER: I do not think Mr. Fuller would object to that if the matter were placed properly before him. Have the counsel state what the dimensions of this freight depot will be and give some idea as to what it is going to be. I think the commission ought to know that.

116 Mr. MALARKEY: You have shelters there now, have you not?

Mr. GILTNER: I think the citizens have put up one or two places there where the people can be sheltered, but the town of Milwaukee extends over a great deal of ground and this freight depot is a place where we would like to have this accommodation.

Mr. MALARKEY: I suppose you would like to have one at every corner.

Mr. GILTNER: That is inconsistent, Mr. Malarkey. The people only ask for one in Milwaukee, Mr. Malarkey, and it is little enough to furnish. We are not here to ask for a freight depot on every corner and you know it.

Mr. FULLER: There might be a site picked out first.

Mr. MALARKEY: We have stated the offer and the terms upon which we will submit to an order and we do not want an order made requiring us to furnish a passenger depot, and I suppose the citizens of Milwaukee would be satisfied if it were built in such a manner that people could step under it. What we do object to is for an order telling us to have a passenger — established there. They have fifteen

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minute car service—Richmond has twenty minute service and they do not have passenger depots. I do not think the service demands it. This freight shed we are willing to erect and I think the citizens of Milwaukee would not ask for a passenger depot. I do not see any objection to building it so people can get under it, but we do not want to have any order of this commission entered upon that would call upon us to erect a passenger depot, because it seems to us that if this commission were going to have a depot erected there on this system of interurban business that different ones would be making similar demands. I am satisfied there would be no controversy but the point is that we do not want an order requiring us to erect a building of that kind.

Mr. WEST: You would not be accused of erecting a passenger depot.

Mr. MALARKEY: No, I suppose not; still we do not want anything to go into the records here wherein any order is made requir-
117 ing us to erect a passenger depot or something in the nature of a passenger depot.

Mr. AITCHISON: Why cannot that matter be held in abeyance and this part of the complaint can be held.

Mr. GILTNER: Anything that will shelter the people there will be satisfactory.

Mr. AITCHISON: Mr. Giltner, this matter I was calling your attention to in the first five lines on the second page of your complaint relative to the dangerous condition of alighting place. The answer of the defendant states it is willing to remedy that. Why not put some testimony in as to what that condition is.

Mr. FULLER: Well, this side of the bridge the ground is about at the level of the track,—about two feet. I mean where the planking is——

Mr. GILTNER: You will fix that?

Mr. FULLER: Yes sir. The place, I understand, is practically at the level of the track, Mr. Schindler?

Mr. SCHINDLER: Yes sir.

Mr. GILTNER: I think they will be satisfied as to that.

Mr. AITCHISON: Mr. Fuller, you will be willing to make an order that motormen will not run onto the bridge, will you not?

Mr. FULLER: The conductors are not supposed to let anyone off on the bridge.

Mr. AITCHISON: Then the matter may be considered as closed.

Mr. GILTNER: I would like to know whether this matter has been of frequent occurrence or not—letting passengers off on the bridge?

Mr. SCHINDLER: Well, the way it is, sometimes their carmen are careless; sometimes they stop at Milwaukee every few blocks and, of course, sometimes the conductors are careless and they go a little too far ahead.

Mr. FULLER: Sometimes they run past the crossing into the street?

Mr. SCHINDLER: Yes sir.

Mr. FULLER: If you will take up any particular case it will
118 be looked into.

Mr. AITCHISON: This matter may be considered as sub-

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mitted except as far as shelter for passengers is concerned, and that will be——

Mr. WRIGHT (interrupting): We are here representing the Oak Grove complainants and I had forgotten about this freight matter coming up and I find that is disposed of now and we have quite a number of witnesses, and I would suggest to Mr. Giltner, and Mr. Malarkey as well, that we do away with arguments and long statements and receive the testimony now and do our arguing afterwards.

Mr. GILTNER: Let us take one thing at a time.

Mr. AITCHISON: I thought it was understood here that the parties were going to be able to stipulate all the facts?

Mr. WRIGHT: I think the commission is aware that I sent for subpœnas and I do not see how we can because I shall bring out quite a number of facts which I consider important.

Mr. GILTNER: Of course I have nothing to do with the Oak Grove case. It would not take me very long. Mr. Malarkey, I would ask about this discrimination, or unjust discrimination in regard to these passenger rates. I would like to finish that altogether; I am not very long winded.

Mr. WRIGHT: If that is the case, we would not like to put ourselves on record now that they may get away.

Mr. GILTNER: I do not know about this; it may take until midnight. It will not take me fifteen minutes to present my side of the case in regard to the passenger proposition. The testimony is all admitted here and it is a question of your power to do this or that, or a question of law.

Mr. MALARKEY: I do not know what the procedure of this commission is, but to the complaints that are filed by these various complainants we filed answers in which we set up some new matter and I do not believe there was any reply filed to the answers

119 Mr. AITCHISON: It is not required to do so.

Mr. MALARKEY: Now it seems to me that we ought to be able to agree upon most of the facts here, that is, both as to the Milwaukee case and the Oak Grove case.

Mr. GILTNER: Let us try one at a time.

Mr. MALARKEY: The questions are just the same and I do not want to make the same argument again to the commission—the questions are substantially the same.

Mr. AITCHISON: Have you another case in the morning?

Mr. GILTNER: I have a trial before the Civil Service and I must examine a number of witnesses and will be very busy and I would like to finish.

Mr. MALARKEY: Suppose that you and I then agree if we can upon the facts as to this Milwaukee case and then you can make your argument to the commission. I do not want to repeat my argument.

Mr. GILTNER: I will agree with you as to the facts. (To Mr. Wright: How long will it take you to put in this matter?)

Mr. WRIGHT: I cannot say how long exactly.

Mr. GILTNER: Suppose we set a convenient date to argue this matter.

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Mr. AITCHISON: We will be here Thursday.

Mr. MALARKEY: That will be satisfactory.

Mr. GILTNER: At 9.30 o'clock.

Mr. AITCHISON: That will be convenient; at this place. That case will be continued until 9.30 o'clock then.

Mr. MALARKEY: We will agree upon the facts now then.

Mr. GILTNER: That will be all right.

Mr. AITCHISON: We are trying to arrange now, Mr. Wright, so that we can take your evidence now.

Mr. GILTNER: There is one thing, Mr. Malarkey, I would like to have Mr.—no, I do not care to have his testimony. I think the answer in these cases here in regard to this fare practically admit all the allegations in this complaint. They have something here: That it is pretty hard to break up the denomination of a
120 nickle and pay in cents. There is one thing here and that is, that the people from Lents can get a transfer to any part of the city while the city of Milwaukee cannot get a transfer; four miles distant and a five cent fare, while the citizens of Milwaukee pay a ten cent fare and do not get any transfer at all.

Mr. FULLER: They can get a transfer by paying their fare.

Mr. AITCHISON: Mr. Fuller, I wish to state that I have attempted that and have been unable to get a transfer. That is a fact.

Mr. FULLER: Well, I have never attempted it.

Mr. AITCHISON: I do not want to testify in this matter, but I want to tell you I have tried and never could get it.

Mr. FULLER: On which car—the Oregon City car?

Mr. AITCHISON: Yes sir.

Mr. FULLER: Well, I never tried it.

Mr. GILTNER: I tried it and could not.

Mr. AITCHISON: What objection do you have, Mr. Fuller?

Mr. FULLER: That would call for a transfer on all lines outside the city and there is a great many cities where it is not customary at all.

Mr. AITCHISON: Is it not a matter of fact that one who does not know of your regulation pays the same fare and gets no transfer while the other man does?

Mr. FULLER: That is a rule and would cause a man to take advantage of a city ride.

Mr. GILTNER: We want to say that there are people who live at Nickum, also outside the city limits, who get a transfer and only pay five cents.

Mr. FULLER: They are supposed to get it. The people at Nickum are getting it and the people of Milwaukee too—I supposed they were.

Mr. GILTNER: They are not—under the same conditions.

Mr. FULLER: Nickum is a five cent and Milwaukee is a ten
121 cent fare and the people beyond Nickum are supposed to get the transfer, and the people beyond Milwaukee are supposed to get it.

Mr. GILTNER: Suppose we argue this—I will argue this case upon the admissions in the answer and upon the allegations in the case. I am satisfied to take it up.

Mr. MALARKEY: We had to respond to your complaint and we are bound, at least we are willing to be bound by the admissions that are admitted by the answer. Do you admit the facts are as stated in our answer?

Mr. GILTNER: There is a little discrepancy as to the distance between Milwaukee and the Golf Links—it is a mile and one-eighth instead of a mile and thirty-five hundredths.

Mr. MALARKEY: With that exception do you admit that the facts set forth in our answer are true?

Mr. GILTNER: There is a hundred and fifty foot difference between the two places—between Nickum and Golf Links and Milwaukee and the Golf Links. We would also ask you to bring in this agreement had with the citizens of Lents with your predecessors and interests, so that we can see what that is.

Mr. MALARKEY: You will require us to prove that?

Mr. GILTNER: Have you that with you?

Mr. MALARKEY: Yes sir.

Mr. GILTNER: Everything I understand—new matter—set up here is supposed to be denied?

Mr. AITCHISON: It is denied unless you consent to it being admitted. Are you demurring to the answer?

Mr. GILTNER: No sir; we are trying to agree upon the facts.

Mr. MALARKEY: As I understand Mr. Giltner, representing the plaintiff in this case, admits the allegations of new matter contained in the answer except as to the distance from Milwaukee to Golf Junction, and except as to the distance from Golf Junction to Nickum, and except that he requires us to prove this agreement referred to in the answer as being made between the defend-
122 ant's predecessors and interests and the people of Lents in connection with the acquisition of the railroad from Portland to Lents.

Mr. GILTNER: And except as to the denomination of any cash fare other than in sums divisible by five. Outside of that we practically agree upon the statements of facts.

Mr. MALARKEY: Now then, these admissions being made there are certain issues of fact remaining between the parties—one of them as to the distance from Golf Junction to Milwaukee, and the other as to the distance from Nickum to Golf Junction, and the lowest denominations of moneys entailing an endless amount of trouble. Do you want to introduce evidence upon the question of these differences in distance?

Mr. GILTNER: I think Mr. Fuller practically admitted that it is because his calculation was based upon measurements to a certain part of Milwaukee while ours is to the city limits. That is the fact. There is 150 feet difference.

Mr. AITCHISON: Why cannot you concede that the distance is practically the same?

Mr. GILTNER: Call Mr. Schindler.

WM. SCHINDLER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GILTNER: Did you measure the distance from Nickum to Golf Links and from Milwaukee to Golf Links?

A. We measured with a tape line from Nickum station to Golf Links. Coming down from Nickum we took the inside rail; from Milwaukee we took the outside rail.

Mr. AITCHISON: What is the distance from Golf Junction to Nickum as you measured it?

Mr. GILTNER: They measured the rails.

Mr. SCHINDLER: 6330 feet from the Links to Milwaukee;
123 from Nickum to Golf Links 6180 feet.

Mr. AITCHISON: Now what is the distance from Golf Junction to the car barns?

A. 6230 feet.

Mr. GILTNER: How did you arrive at this measurement?

Mr. SCHINDLER: We had a tape line and measured the rails.

Q. What is the length of the rails?

A. Thirty foot rails.

Q. How many rails were there between the Golf Links station and the town of Milwaukee where you measured to?

A. 211 rails.

Q. What is the length of the rails?

A. Thirty foot rails.

Q. How many rails between Nickum station and Golf Links?

A. 206.

Q. What length rails?

A. Thirty foot rails.

Q. When did you make your measurements?

A. I cannot say exactly—about a month ago.

Mr. MALARKEY: When was it you did this measuring?

Mr. MALARKEY: When was it you did this measuring?

A. About a month ago.

Q. Do you get at these figures—6180 and 6330—by measurement or by counting rails?

A. By counting rails and figuring it out.

Q. Then you did not measure the distance.

A. We counted rails and measured too.

Q. Did you measure all the distance from Golf Junction?

A. We counted the rails.

Q. Now answer my question.

A. We had a tape line along and we measured every rail we thought was short; yes, sir.

Q. Did you find any short?

A. Yes, sir.

Q. Then your figures are short?

A. We corrected that.

Q. How?

A. We put down the length of the rails and figured the
124 short ones in.

Q. How much did you say the distance from Golf Junction to Nickum was as you measured it?

A. 6180 feet.

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Q. And how many rails were there?
A. 206 rails.
Q. Well, there was not any short rails?
A. Yes, sir; there was.
Q How much shortage in rails was there?
A. I could not say exactly; we put the short rails down and figured it out after we got through.
Q. Well, you have your figures there, haven't you?
A. Yes, sir.
Q. Tell me how much you deducted for short rails.
A. I could not tell you hardly, but we had sixty feet in there, surplus; we took it up with two rails.
Q. Why can you not tell me what the shortage in rails between Golf Junction and Nickum was?
A. The list we had I destroyed, and we figured it out and destroyed the list.
Q. Now, what was the distance as you have it from Golf Junction to Milwaukee?
A. 6330 feet.
Q. And how many rails?
A. All rails.
Q. Then there were no short rails?
A. Yes, sir; there was.
Q. How many short rails were there?
A. I could not tell you exactly.
Q. How much did you deduct for short rails?
A. We measured them out.
Q. At what point in Milwaukee did you measure to to obtain this distance of 6330 feet?
A. Parallel with the car barn where the Golf Links car stops.
Q. And where did you begin your measurement—at what point at the Golf Junction?
A. At the middle station, I think.
125 Q. You think—are you sure?
A. At the middle station.
Q. What is the shape of that station?
A. Oh, about twenty feet long I should judge.
Q. And when you measured from Golf Junction to Nickum from what point did you measure?
A. From the middle station.
Q. Did you measure from the same point when measuring toward Nickum as when measuring to Milwaukee?
A. Why certainly.
Q. You did?
A. Why certainly.
Q. Now this starting point from which you measured: Was it beyond where the tracks from Nickum and Golf Junction converge?
A. At the center of the square—at the center of the track where the road crosses.

Mr. MALARKEY: That is all.

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Mr. GILTNER: You made allowance then, Mr. Schindler, for short rails between Nickum station and Golf Links?

A. We measured them all and figured it up.

Q. And also between Golf Links and Milwaukee?

A. Yes, sir.

Q. What did you find as to the difference in distance between the two places from the Golf Links, Mr. Schindler?

A. 150 feet.

Q. Who measured it with you?

A. Streib and Kelso.

Mr. AITCHISON: Do you want any more evidence; practically be a repetition.

Defendant shows distance Golf Junction to Nickum as.....	6072′
Plaintiff " " " " " " "	6180′
A difference there of.....	108′
Plaintiff shows distance Golf Junction to Milwaukee.....	7128′
Defendant " " " " " "	6330′
A difference there of.....	798′
Making a total difference of.....	690′

whereas you say 150′ only difference between the two points.

The real difference is 690 feet.

Mr. MALARKEY: I will admit that he will testify to the
126 same thing. Before Mr. Schindler leaves I want to ask one more question. (That is, the men who were with Mr. Schindler when estimating would testify to the same thing.) Isn't there a junction there at Golf Junction? Doesn't the car track come up like that (Drawing a diagram) and then this line comes down? What I want to find out, in measuring two different directions they were not measuring from the same point. Referring now to the diagram that you have produced here, which is marked Exhibit 1, which shows how you made these measurements—why, the tracks are not as shown on this diagram, are they?

Mr. SCHINDLER: Well, it is just that way on there.

Q. I asked you if the tracks are as shown on the diagram?

A. Yes, sir.

Q. Is it not a fact that the car which goes to Oregon City goes on the track at the bottom?

A. Yes, sir.

Q. And is there any track as shown here—the car don't make a square turn like that, does it?

A. No, sir; that is just a general outline but the cars go to Milwaukee.

(Exhibit 1 introduced in evidence by the plaintiff.)

Mr. MALARKEY: Upon this subject *to* distance: I do not suppose that you will admit, Mr. Giltner, that our engineers will testify that

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these distances as shown in our schedules here are the distances to Milwaukee and to Island Station?

Mr. GILTNER: The distance to Island Station *is* referred to here in this schedule is not the same distance as testified to by Mr. Schindler, Mr. Streib and the other gentleman as between the Golf Links and the car barn.

Mr. MALARKEY: Island Station is a separate station as shown on our schedule.

Mr. GILTNER: I do not know the distances as shown to Island Station.

Mr. MALARKEY: You see, Island Station is a separate station. It is only a trifling matter, Mr. Giltner. The impression may
127 have been——

Mr. GILTNER: That is very indefinite; there is a discrepancy.

Mr. AITCHISON: The discrepancy is not large enough so that the commission regards it as material and will so rule.

Mr. GILTNER: We will admit they will testify as to these distances as set forth in the schedules. (Referring to O. R. C. No. 1.)

Mr. MALARKEY: Now then, the defendant offers in evidence in reply to further exception of the plaintiff the agreement entered into by and between the Portland, Chicago and Mount Scott Railway and the Portland City and Oregon Railway Company, of which this company are the successors and assigns.

Mr. AITCHISON: I suppose that is the original—we would like to have a copy.

Mr. GILTNER: I will admit that the contract is made.

Mr. MALARKEY: We will substitute a verified copy.

(Defendant introduces in evidence Exhibit 2.)

Mr. AITCHISON: (No objection made.)

Mr. MALARKEY: Now, I think that is all except that counsel says that he denies something as to its being impracticable to collect fares in denominations of cents.

Mr. GILTNER: The commission can take that from their own experience to tell whether it is or not. I do not know that it is really necessary to introduce anything on that; it is a matter of common experience. You know they use them up here at the post office.

Mr. MALARKEY (Reading from defendant's answer, lines 15 to 20 inc. page 3). "It is impracticable to maintain offices at every street corner for the sale of tickets and fares must therefore be collected upon the cars and it is impracticable to provide change in lower denominations than five cents and there is no standard register of fares upon which it is practicable to register fares in different denominations than sums divisible by five." You will not
128 attempt to deny that we sell commutation tickets at $1.40?

Mr. GILTNER: No, there is no question about that.

Mr. CAMPBELL: Does that include a transfer on those books?

Mr. AITCHISON: There is no transfer privilege on those books.

Mr. MALARKEY: Where is the complaint in this case—No. 89? Now, we want to offer in evidence for the purpose of illustrating the situation and aid of arguments made herein a plat that has been

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prepared that shows the relative location of these different lines. We do not undertake to show curves.

Mr. GILTNER: Where did you make it from—what is the object of this?

Mr. MALARKEY: It is to be used in arguing the matters to the commission.

Mr. GILTNER: I will not admit the maps are correct as to distance.

Mr. MALARKEY: It does not purport to be correct as to scale, but it shows as to directions. We could not go out beyond this on the Cazardero line. That it simply to show directions. (Defendant's Exhibit 3.)

Mr. AITCHISON: As I understand it, that map does not purport to be drawn to any scale.

Mr. MALARKEY: Drawn to a scale; yes, sir, but does not purport to be drawn to any lines—just direction—just shows the directions the lines go.

Mr. GILTNER: I do not think that is a correct map. I do not think it should be introduced in evidence. I will not admit those places are properly placed. I will admit it if it is not introduced to show any scale, just to show general directions merely for convenience of showing the names of the places.

Mr. AITCHISON: This case will then stand adjourned until
129 9:30 o'clock Thursday morning (October 31st, 1907). Files 89 and 93 intermingled.)

130 STATE OF OREGON,
County of Marion, ss:

I, F. Roy Davis, the Official Stenographer duly appointed by the Railroad Commission of Oregon, do hereby certify that the foregoing is a full, true and correct transcript in longhand of all the testimony, evidence and proceedings had on the above entitled investigation before said commission, carefully compared by me with my original notes thereof taken down by me, and I hereby certify the foregoing to be a correct statement of all the evidence and proceedings had on said investigation, as taken and transcribed by me.

Witness my hand officially, this 3rd day of January, 1908.

F. ROY DAVIS,
Stenographer of Railroad Commission of Oregon.

(Here follows diagram marked p. 131.)

132 Ex. 2. C. B. A., Comm'r.

This agreement made and entered into this 30th day of April, 1901, by and between the Portland, Chicago & Mt. Scott Railway Company, a corporation duly created, organized and existing under the general incorporation laws of the state of Oregon and having its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the first part, and the Portland City and Oregon Railway Company, a corporation duly created, or-

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Links to Med 211-30ft rails 6330
Links to Duck 206-30ft " 6180

no. 119.
P.R.R.Co.
v.
R.R.Co.
} p. 134.

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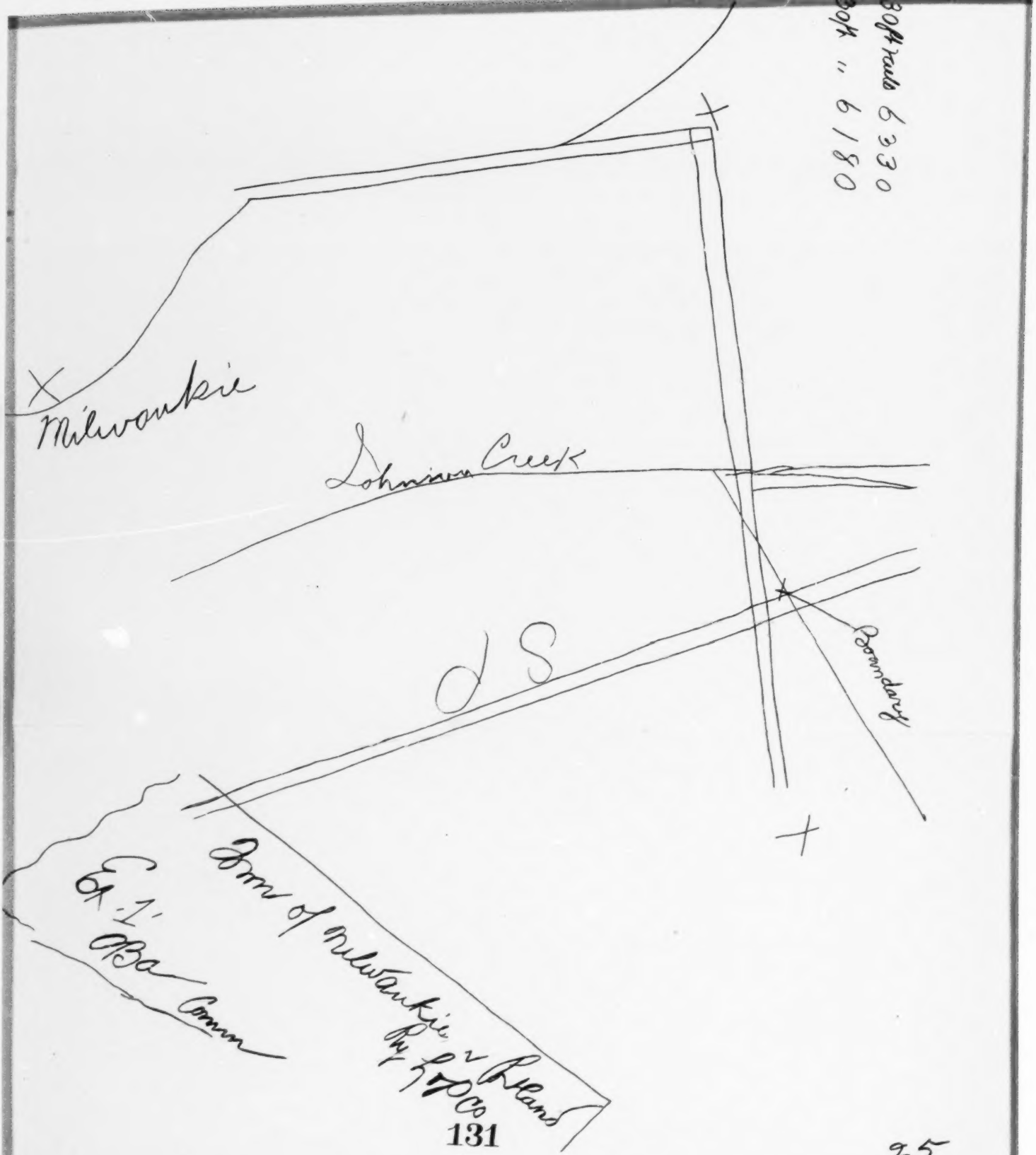
Book Vols 6330
Book " 6180
Milwaukie
Johnson Creek
Boundary
Bdy of Milwaukie Ry & Power Co Lands
Ex. I. & Ba Comm

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ganized and existing under the general incorporation laws of the state of Oregon, and having its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the second part; witnesseth:

That the party of the first part hereby contracts and agrees with the party of the second part that it will on or before sixty (60) days from the date hereof sell and convey unto the party of the second part by good and sufficient deeds of conveyance all of the property, real, personal and mixed of the party of the first part including its right of way and railway track as well as all other property; said property and all thereof to be sold, conveyed and turned over to the said party of the second part as aforesaid free of all claims and incumbrances whatsoever.

In consideration whereof the party of the second part hereby agrees that it will within sixty (60) days from the date hereof at its own expense and cost substantially and fully equip the said line of railway of the party of the first part hereby agreed to be conveyed running from Hawthorne Avenue in the City of Portland, Oregon, and thence in a southeasterly direction to the town of Lents in Multnomah County, with the poles and wires necessary for the transmission of electric power to propel cars from the town of Lents over the said line now owned by the party of the first part hereby contracted to be conveyed and over the lines of railway of the party of the second part to and through the city of Portland, and to receive all benefits of transfer to other lines that exchange transfer privileges now or hereafter with lines operated by said second party;

and the said second party agrees that within the said sixty
133 (60) days from the date hereof it will have the said line in operation in connection with the present line of the party of the second part. And the party of the second part further agrees that as a consideration for the said conveyance so to be made by the party of the first part to it of said property hereinbefore mentioned that it, the party of the second part, will operate the said railway between the said points of termini, to-wit, between said town of Lents and that part of the city of Portland west of the Williamette River, and will run through cars thereover and will not make less than twelve trips per day with passenger coach or coaches each way, schedule to be arranged about as follows: Leave Portland (terminus) every hour from 6:45 a. m. to 6:45 p. m., then 11:15 p. m., and Saturdays and Sundays 9:15 p. m. Leave Lents every hour from 5:55 a. m. to 6:55 p. m., then 10:30 p. m., and Saturdays and Sundays 9:25 p. m.; and the fare from the town of Lents or intermediate points to and through the city of Portland over the lines of the Portland City and Oregon Railway Company shall never exceed five cents (5c) per passenger for a single continuous trip either way. It is understood that the party of the second part shall not be obligated to run the said number or any cars over said line in the event that it is made impracticable to do so by reason of strikes, accidents or causes beyond the control of the party of the second part and while such conditions exist.

It is mutually understood and agreed that upon the execution of this contract the party of the second part may take possession and go upon all the property of the first part and may proceed without interruption or hindrance from the party of the first part to make such improvements and changes and to do such work as may be necessary thereupon or thereabout for the purpose of placing said property and railway line in safe condition for operation as stipulated for in this contract; the present line of road to be operated as now laid except where road can be improved by easing curves or doing away with bridge or trestle work.

Provided, and this agreement is upon the express condition that if the said party of the second part shall at any time during ten
134 the term of [five]* years from the date hereof fail to perform the covenants hereinabove contained by it to be performed substantially as provided; or, shall, during said period, abandon the said road of the party of the first part, or attempt to tear up or remove the same or any part thereof except for necessary repairs or changes in accordance with the spirit of the foregoing agreement, the said party of the second part shall, upon demand of the party of the first part, turn back to said party of the first part all the property that may be conveyed and turned over to said party of the second part by said party of the first part pursuant to this agreement free from incumbrance and in as good condition as the same may be in when so conveyed.

In witness whereof, the said parties hereto pursuant to resolutions of their respective boards of directors authorizing the same have caused these presents to be executed in duplicate by their respective presidents and secretaries and their corporate seals to be hereunto affixed the day and year first hereinabove written.

PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,

(Signed) By G. G. GAMMANS, *President.*

[Seal of Portland Chicago & Mt. Scott Railway Co.]

PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,

(Signed) By GEO. A. BRODIE, *Secretary.*

PORTLAND CITY AND OREGON RAILWAY CO.,

(Signed) By W. H. HURLBURT, *President.*

[Seal of Portland City and Oregon Railway Co.]

PORTLAND CITY AND OREGON RAILWAY CO.,

(Signed) By WM. T. MUIR, *Secretary.*

NOTE.—Ten years inserted by consent.

(Signed) GEO. A. BRODIE,
Sec'y P. C. & Ore. Ry. Co.

[* Words enclosed in brackets erased in copy.]

COPY BOUND CLOS

135 STATE OF OREGON,
County of Multnomah, ss:

I, C. A. Maney, do hereby certify that I have compared the foregoing copy of agreement between the Portland, Chicago & Mt. Scott Railway Company and the Portland City and Oregon Railway Company, with the original thereof, and the same is a true and correct copy of the same and of the whole thereof.

In witness whereof, I have hereunto set my hand and Notarial seal on this 29th day of October, 1907.

[SEAL.]

C. A. MANEY,
Notary Public for Oregon.

136 Before the Railroad Commission of Oregon.

No. 89.

THE TOWN OF MILWAUKEE, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

We hereby certify that the foregoing and annexed are the original exhibits introduced in evidence upon the hearing and investigation of the above entitled matter.

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
E. G. MILLER,
Acting Secretary.
[SEAL.]

137 Case No. 6967, 6968, Drawer No. 652.

Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

Index.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

Witnesses.

For the plaintiff:

W. P. Mulchay		2
" " "	(recall)	41 & 69
Isaac Hill		6
" "	(recall)	28

E IN CENTER

John B. Bigham 15
" " " (recall) 36
Louis E. Armstrong 23
Joseph M. Hart 31
Frederick Heger 37
" " (recall) 64
J. J. Miller 52
" " " (recall) 65
C. N. Huggins 72
" " " (recall) ..... 81 & 171
Oswald West 77
" " (recall) 158½
F. I. Fuller 112
" " " (recall) 248

For the defendant:

Richard Scott 172
John Risley 190
George N. Hively 205
James Reed 213
Philip Streib 226
William Schindler 239
" " (recall) 253

(N. B.—See Note on bottom of affidavit.)

138 In the Circuit Court of the State of Oregon for the County of Marion.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,

v.

RAILROAD COMMISSION OF OREGON, Defendant.

Transcript of Evidence.

At the hearing of the above entitled matter in the Circuit Court of the State of Oregon for the County of Marion, begun at the hour of 1:00 o'clock in the afternoon on the 12th day of March, 1908, in the Circuit Court Room at the Marion County Court House in the City of Salem, Oregon, the following evidence was offered and received and the following proceedings were had, to-wit:

Present: William Galloway, Presiding Judge;

Fred V. Holman and F. T. Griffith, its Attorneys, and F. I. Fuller, its Vice President, appeared for the plaintiff;

Attorney General Crawford, Giltner & Sewall, Attorneys and Clyde B. Aitchison, Railroad Commissioner, appeared for the defendants.

(Mr. Giltner filed an amended answer to the complaint.)

Mr. GRIFFITH: We wish to consider all of the new evidence in the answer as denied and so stipulated.

Mr. GRIFFITH: If your Honor pleases, there are two cases for your consideration—one known as the Milwaukee case, No. 8962, and one known as the Oak Grove case, No. 8963, and in the consideration of the testimony we desire that the testimony so taken will be used and considered in both cases and it is so stipulated.

139 Mr. CRAWFORD: The testimony will be used for both cases; yes sir.

Mr. GRIFFITH: It is stipulated by counsel in open court that the testimony taken in one case will be considered in both cases.

Mr. GRIFFITH: Your Honor having heard a rather full argument I do not imagine any statement will be necessary in opening this case at this time. I will therefore call Mr. Mulchay.

W. P. MULCHAY, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: State your full name, residence and occupation.

A. W. P. Mulchay, Portland, Oregon; Traffic Agent of the Portland Railway Light and Power Company.

Q. How long have you been Traffic Agent of the Portland Railway Light and Power Company?

A. About four years.

Q. During a portion of the four years, however, it was not the *the* Portland Railway Light and Power Company, was it?

A. No, sir; it was the Oregon Water Power when I first began.

Q. And you occupied the same position with the Oregon Water Power Company that you now occupy with the Portland Railway Light and Power Company?

A. Yes, sir.

Q. Are you familiar with the lines acquired by the Portland Railway Light and Power Company from the Oregon Water Power Company?

A. Yes, sir.

Q. Are you also familiar with the rates of fare established on the Oregon Water Power branch—upon lines of the Oregon

140 Water Power Company?

A. I am.

Mr. GRIFFITH: I now hand you a map. (Hands witness a blue print) representing the lines of the Oregon Water Power Company and ask you if that is a correct representation of the lines of that company? Is the map now in your hands a correct representation of the present railway of the Oregon Water Power lines?

A. Yes, sir.

Q. Did you prepare this map?

A. Yes, sir.

Q. What are those marks? (Indicating map.)

A. That represents the distances and rates.

Q. As they are indicated on this map are they correct—are they according to the tariffs of the Portland Railway Light and Power Company?

A. Yes, sir.
Q. In every instance?
A. In every instance.
Q. I desire to offer this map in evidence.
Mr. CRAWFORD (examining map): Did you get this up out on the ground?
A. It was supposed to be printed from the original records.
Q. Did you see the original records?
A. No sir.
Q. You did not take it from the surveys?
A. No sir.
Q. How do you know it is made from the original surveys?
A. It was taken from the records in that department.
Mr. AITCHISON (examining map): This road should be on the boundary line and not inside the boundary line.
Mr. GILTNER: Well, see if there is anything else wrong with it.
Mr. CRAWFORD: What designates the city boundary line of Portland?
WITNESS: Indicates by pointing on the map.
Mr. GRIFFITH: Indicating single hatched line.
Mr. CRAWFORD: This broken line?
A. Yes sir.
Mr. CRAWFORD: Where is the railroad at the Golf Links?
141 What indicates that?
WITNESS: Right down here. (Pointing to map.) This black and white double line represents the railroad.
Mr. CRAWFORD: Now at the Golf Links does your road, as a matter of fact, run inside or outside of the corporate limits of the City of Portland or along the line?
A. I believe right along the line.
Q. That map then does not show the line correctly at the Golf Links, does it?
Mr. GRIFFITH: In the pleadings of this case the defendants admit in the answer that the Golf Links is at the city boundary; that the station of Nickum is 3000 feet east of the city boundary of Portland and that Mount Tabor is the city boundary so that it is not material that this map show the boundary line.
Mr. CRAWFORD: But it is material that this map may not be correct in a great many other respects. That is our particular point—to show the inaccuracy of the map.
Mr. AITCHISON: This does not show all the stations, does it?
A. There may be one or two stops not shown but I think it has them all.
Mr. AITCHISON: It does not show the station of Brookwild, does it?
A. No, that was before it was drawn .
Q. If it were drawn after that station was put in it would show it, would it not.
A. I mean the map was drawn before.

Mr. CRAWFORD: You say that you prepared that map from data furnished you by the company?

A. That was prepared from our tariffs.

Q. Prepared from what?

142 A From our tariffs which are on file with the Commission.

Q. Who prepared those tariffs?

A. I prepare the tariffs.

Q. Then that map is not made from any data of the survey of the railroad?

A. No sir.

Q. Then you cannot testify that this is a correct outline map of the railroad?

A. No, I could not testify that it was. The data was furnished me by the engineering department.

Q. Then these tariffs you speak of are the rates that are published and posted up for the information of the public?

A. Yes sir.

Mr. CRAWFORD: We object to the map as not being properly proven, as not having been prepared from original data, but having been prepared mainly from information furnished from tariffs—schedules—and not from any survey of the road, and as being incompetent and immaterial.

COURT: Will rule upon that later.

Mr. GRIFFITH: You have located on this map the locations of the different stations—showing the stations as the tariffs show them? Have you shown thereon the mileage of the stations thereon?

A. Yes sir.

Q. And does that show the place where each station is indicated thereon the rates of fare in accordance with the tariffs you have filed with the Railroad Commission of Oregon?

A. Yes sir.

Mr. GRIFFITH: We shall submit the map saying that it conforms with the tariffs filed with the Railroad Commission of Oregon. It shows the distances to various stations, and those distances also as to each of these points and for that purpose we offer it in evidence.

Mr. CRAWFORD: One more objection we wish to interpose and that is that it is incompetent and immaterial as evidence

143 tending to show no discrimination between the points mentioned in the order which the complaint attacks and asks to have set aside.

Mr. GRIFFITH: If you Honor please, if the Attorney General had read the complaints in this case he would know that every point at issue in this case are shown in the pleadings. We submit the map as entirely proper. We ask that the map be submitted in evidence and marked as "P. R. L. & P. Exhibit 1" to distinguish it from those on file with the Railroad Commission of Oregon. With the permission of the Court I will withdraw this witness, and place him upon the stand again later. I will now call Mr. Hill.

ISAAC HILL, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: Please state your full name and place of residence.

A. Isaac Hill and I live near Courtney Station—about 200 feet south.

Q. On the Oregon Water Power Line?

A. Yes sir.

Q. How long have you lived there, Mr. Hill?

A. Almost a year lacking a few days.

Q. What business are you engaged in?

A. None in particular at the present time.

Q. State whether or not you travel frequently on the railway line from your home at Courtney.

A. I have.

Q. State, when traveling, whether or not it is your custom to purchase commutation tickets as issued by the company?

A. Yes sir; always.

144 Q. What do you pay for those commutation tickets which you buy?

A. For 20 tickets I pay $1.60. $1.60 for a book.

Q. And each ticket entitles you to a ride how far?

A. From our place, Courtney Station, to Alder Street in the City of Portland.

Q. Do you know the distance—as to how far it is from your station to First and Alder Streets in the City of Portland?

A. Well, I never measured it, but presume it is somewhere in the neighborhood of eight miles by rail.

Q. State whether or not you travel quite frequently on the line going to and from your home.

A. I travel quite frequently over the line—from once to three times a week.

Q. Are you acquainted with the practice of your neighbors out there at Courtney in the matter of traveling on the line of the company, as to whether or not they use commutation tickets?

A. So far as my own knowledge goes, they do.

Q. State, Mr. Hill, what induced you to take up your residence out there at Courtney Station?

Mr. GILTNER: I object to that as incompetent and irrelevant.

COURT: Objection overruled.

A. I considered the street car fare reasonable; also I liked the country up there for another reason. There were various reasons. I bought property there. I considered the railroad fare reasonable. If I had considered the fare exorbitant I should not have gone there at all.

Mr. GRIFFITH: Then the reasonableness of the fare was one of the factors which induced you to take up your residence at Courtney?

A. Yes sir; that was one reason.

145 Q. What is the fact in traveling from Courtney to Portland—on the ride from Courtney to Portland as to whether or not you get off the car at any place between Courtney and Portland?

A. In what respect?

Q. Do you make any shorter trip on the line or do you go clear through?

A. I very seldom stop off; I generally ride through. I have not done so more than once or possibly twice.

Q. What is the fact as to whether the residents and others in that vicinity, whether or not they travel all the way through?

A. They don't get off except in a very few instances to my knowledge. I have known a few people to leave the car at Golf Links.

Q. And the general practice, according to your knowledge, is that the people getting on at Courtney travel right straight through to First and Alder Streets?

A. Quite generally; yes sir.

Q. What is the fact, as to the distance, of your knowledge of these people getting on at Center, Oak Grove, Risley and Milwaukee Heights riding through to First and Alder Streets?

A. So far as my knowledge goes the most people travel clear through to First and Alder Streets. The most of them do. That has been my observation.

Q. State whether or not you have any knowledge of the fact as to whether people have settled at Courtney, as you have, because of the reasonableness of the fare under the commutation book tickets?

A. I don't know that that is the reason but I would infer they were satisfied. Many people have settled there since I have too.

Mr. GILTNER: How far beyond Oak Grove do you live?

146 A. Between 400 and 500 feet north of Oak Grove Station—somewhere in that neighborhood.

Q. What do you pay for a ticket—not a commutation ticket, but a single ticket?

Mr. GRIFFITH: I object to this as improper cross examination as this is directed to single tickets and not to commutation tickets.

Mr. GILTNER: I think I have a right to find out what the rate is.

Mr. GRIFFITH: The examination of this witness has been confined to commutation tickets and that class of residents.

Mr. GILTNER: I will withdraw the question.

Mr. GILTNER: How long do you say you have lived there?

A. A few days less than a year. We moved there some time in the first of April, a year ago.

Q. Have you built a home there?

A. No sir; I bought it already built.

Q. It was already built—you bought some one out?

A. I bought improved property.

Q. How much property have you?

A. About three-quarters of an acre; possibly a fraction over.

Q. Did you buy that on account of the fact that it was a reasonable purchase?

A. Partly.

Q. That was one of the inducements that induced you to purchase that property up there?

A. That was one of the inducements.

Q. Where do you come from?

A. West Virginia.

Q. Where did you live just prior to the time you moved out there?

A. In Portland—in the City of Portland.

Q. The controlling motive that influenced you in buying that property was because it was a good buy and a pleasant place

147 to live, wasn't it?

A. That wasn't all of it.

Q. Wasn't that the controlling motive?

A. I guess that possibly that was the controlling motive.

Q. If the property had not been cheap and reasonable you would not have purchased it, would you?

A. I did not consider it in the sense of cheap property. I think I paid all it was worth.

Q. It was reasonable, wasn't it?

A. It was reasonable; yes sir, but I do not consider it cheap.

Q. Did you know what the rates on the car lines were when you bought this property?

A. Yes sir, I knew what the rates were.

Q. How did you know what they were?

A. I knew through friends.

Q. Did you know the rate from Portland to Lents?

A. Yes sir; because I had been out on the ground.

Q. That is a nice part of the country?

A. In a way it is.

Q. Very pretty country. Just as pretty as where you live?

A. As far as living for health is concerned, probably it is.

Q. And then you say there was other motives influenced you in moving up there. What were they?

A. One was that I got a little tired of living in the city. I wanted to get out of town.

Q. Is that all you remember now?

A. That is all I know of particularly.

Q. Then, as I understand your testimony, you moved up there because you got tired of living in the city?

A. That was one of the reasons.

Q. In other words, another reason was you thought it was

148 a pleasant place to live and that it was healthy?

A. Not particulary; because I have good health.

Q. Do you know of any other reason which influenced you to move there?

A. I might mention more but there are not a great many. I considered the reasonable rates getting in and out of town.

Q. How often do you travel over the road? How often have you travelled over the road during the time you have lived there?

A. I do not think there has been any one week but what I made at least one trip and from that to four or five.

Q. Are you furnished with other facilities by the company?

A. Only what I have paid for. I shipped a little freight a few times.

Q. Isn't it a fact that you have had some conversation with some of the officers or agents of the company in regard to your testimony here today.

A. I talked with one man who I understand has a position with the company but I do not know what it is.

Q. Wasn't it brought to your knowledge—didn't you know there was a suit here today to reduce the fares along the line?

A. There was some talk of that. I heard some talk about it.

Q. You know it now?

A. I do.

Q. Are you opposed to getting a reduction of fares to your home and along the line of that road?

Mr. GRIFFITH: I object to that. It is not a question as to whether he is opposed to a reduction of fares generally. This must be confined to a question of fare and not general fares. I assume that any man would be glad to get a reduction of fare to his home no matter where he is, but when you are cross examining my witness you must cross examine.

COURT: You may answer the question.

149 A. I certainly would not object to a cheaper fare but I cannot say that the fare—the rate—at the present time is an unreasonable rate.

Mr. GILTNER: I am not asking that—I asked if you are opposed to a reduction in the rates?

A. I am satisfied now with the present rates I am paying.

Q. What are you talking about—the commutation rates or the straight rates?

A. The commutation rates.

Q. You are not talking about the straight rates then?

A. I could not answer that question.

Q. Now, Mr. Hill, isn't it a fact that it has been brought to your attention that if you did not testify here today on behalf of this plaintiff corporation in regard to the reasonableness of that rate that not only that rate would be taken from you—the commutation tickets—but other facilities for freight, or some, or part of those facilities would be taken from you by the railroad company?

A. No sir.

Q. You never heard of that?

A. I heard of that but did not believe it.

Q. You had an intimation of it prior to the time you testified?

A. I heard of that from some of the older settlers.

Q. Isn't it a fact that intimation has had some influence on your mind in having you come up here to testify?

A. No sir; not a bit

Q. Your fare and expenses are paid to come here by the railroad company?

A. My fare was paid. I did not propose to stop work and come up here for nothing.

Q. But you do say that the intimation that was abroad among the people there that if you did not come here to testify on be-
150 half of the railroad had no influence upon you to come here to testify?

A. None at all.

Q.. And you realize now in giving your testimony here that you are combatting your own interest?

A. I am testifying on my own behalf and nobody else's.

Q. You realize the fact that your testimony here combats your own personal interest?

A. I do not know that I understand what you mean.

Q. In regard to the reduction of fares?

A. I am satisfied with them.

Q. And you realize you are combatting your own interests?

A. That may be but I am satisfied.

Q. Did you talk with Mr. Griffith here about the rates?

A. No sir.

Q. With Mr. Fuller?

A. No sir.

Q. Who did you talk with?

WITNESS: Shall I answer the question? (Addressing the Court.)

WITNESS: Mr. Donahue and I had a talk together.

Q. Who is Mr. Donahue?

A. He told me he held a position with the company. I do not know what position it was.

Q. You have talked with nobody else about it?

A. No sir; except some of the neighbors there.

Q. How many new houses have been built around you since you moved up there—new houses?

A. I do not know that I remember; some four or five or six.

Q. Isn't it a fact that that place has stood at a stand-still since you moved up there?

A. No sir. I could not tell you exactly but there are some four or five new houses.

151 Q. In the last year?

A. In the last year. Since I have lived up there in that neighborhood; yes sir.

Q. How many houses have been built in sight of your place since you have been up there?

A. Three, I think, in sight of my place.

Q. Three in sight of your place—new houses?

A. Yes sir.

Q. Isn't it a fact that you went up to Mr. Griffith's office just before you came down here—in Oregon City?

A. In Oregon City I went into some office in a building but I do not know whose office it was.

Q. You did not talk to Mr. Griffith?

A. No sir.

Mr. GRIFFITH: Have you ever talked with me, or have you met me when we talked about this case?

A. I met you in some building down town.

Q. "Down town"—here in Salem?
A. Yes sir; here in Salem.
Q. What did Mr. Donahue ask you when he came to see you?
WITNESS: In regard to this matter?

Mr. CRAWFORD: We object to that as that would be incompetent, immaterial and irrelevant. It don't make any difference.
COURT: The Court believes the witness on that point and believes he was not influenced on that point. The question may be answered now.
Mr. GRIFFITH: Then it will be taken by the rule?
COURT: Yes sir.
Mr. CRAWFORD: I do not understand. It is being taken before the Circuit Judge and not before a Referee, etc.——
COURT: He can answer that question under the rule.
Mr. GRIFFITH: What did Mr. Donahue ask you?
Mr. CRAWFORD: Note the exception.
152 A. What Mr. Donahue asked was if I was coming up here and asked me if I would come.
Q. You were asked if you had some intimation as to facilities being taken away from you. I will ask you if you had such intimation from any officer or agent of the company?
A. Mr. Donahue said something of that nature but I do not remember just exactly the words he used.
Q. What was it he said, do you recall?
A. That it was possible there would be some changes.
Q. By reason of the order of the Commission?
A. Yes sir; but at the same time he said he did not know that it would be the case.
Q. That referred entirely to the change that would grow out of the order of the Commission?
A. Yes sir.
Q. Mr. Hill, you are paid your ordinary witness fees in coming up here to testify, were you not?
A. I am.

(Excused.)

JOHN B. BIGHAM, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: State your name, residence and occupation.
A. John B. Bigham; I live at Oak Grove and I am a stone mason.
Q. Where do you work now?
A. At the present time I am working for a neighbor.
Q. How long have you lived at Oak Grove?
A. Next Fall it will be five years.
Q. Have you a home out there?
A. I have an acre and a quarter.
Q. Did you build your own house on it?
153 A. Yes sir.
Q. What is your habit in the matter of travelling on the line known as the Oregon Water Power passing through Oak Grove to Portland—do you buy commutation tickets from the company?

A. Yes sir.

Q. What are those tickets and how much do you pay for them?

Mr. CRAWFORD: We object to that. We intended to before but thought we would wait a little bit, but we think we might as well settle it now. The complaint attacking the order and filed, that complaint (I mean the order of the court) The order of the Commissioners does not attack commutation tickets at all; it does not refer to commutation tickets in any sense whatever. Now then we insist that this testimony upon commutation tickets upon the line of that road is incompetent and immaterial. The complaint in both cases before the Commission was that these rates to Oak Grove and to Milwaukee were discriminatory, etc.

COURT: You may answer the question.

Mr. CRAWFORD: If the Court pleases, it is not necessary for the stenographer to take all the arguments down.

A. There are 20 tickets in a book and I buy them for $1.70.

Mr. GRIFFITH: At the rate of 8½¢ per ride?

A. Yes sir.

Q. Do you know what the distance is from First and Alder Streets?

A. No, I do not know what the distance is. I have heard it called something like eight miles or 8½ miles; I could not say just exactly what the distance is. All I know about that is hearsay.

Q. That is the distance from Center Station to Portland, First and Alder Streets?

A. Yes sir.

Q. Have you been in the habit of traveling to Portland frequently?

154 A. Yes sir.

Q. How often do you make those trips from your home to Portland?

A. In the Summer I go most every day but lately I have not gone very often.

Q. But you have been traveling over the line frequently in the Summer?

A. Well, every day you might say—working in Portland.

Q. State to the Court what were the inducements or the controlling inducements which induced you to move out to Center?

A. I moved out to better my conditions. I moved out there where I could buy a lot on installments and built a kind of cabin there to better my conditions, which I have.

Q. State whether or not the matter of fare which you paid had anything to do with inducing you to take up your residence there?

A. Well, I looked at the fare but we had a long ride and a nice car to be hauled on and could not ask to be hauled cheaper.

Q. You say you had a nice car to ride in?

A. Yes sir; nicer than any of the others.

Q. State whether or not the fare you have been paying is, in your opinion, a reasonable rate?

Mr. GILTNER: We object to that as incompetent and immaterial.

COURT: The Court has always been very liberal in allowing Counsel to propound questions and the testimony of the witnesses and it has been very satisfactory to the Court. I don't know what other Courts do only from hearsay, and that is to keep Counsel more closely as to questions. The witness may answer the question. The same right will be extended to the other Counsel.

A. I consider it reasonable; from Golf Links to Center it would be about three miles and that gives us a ride there of 3½¢
155 by buying commutation tickets. 3½¢ there and 5¢ when you are in the city limits.

Q. You say you have been engaged in working around Oak Grove, what is the work?

A. Stone work in basements.

Q. Have you been engaged in building basements?

A. Four; yes sir.

Q. Are there any other houses going up there now?

A. Yes sir; I think there is.

Q. Do you know how many there are going up around Center?

A. Two started in the last couple of days. And then there is, of course, during the Winter some who have been repairing and building on bigger. People bought out parties who owned them first and repaired them.

Q. There is considerable activity in building there then?

A. Going on a little all the time.

Q. What is the fact in traveling from Oak Grove into Portland, do you travel the entire distance from Center into First and Alder Streets?

A. Yes sir.

Q. That is your rule almost invariably, is it?

A. Yes sir; unless I am working on the east side and then I go through Sellwood; take a transfer and go through Sellwood.

Q. What is the fact, if you have observed it, as to other residents of Oak Grove, Center, Courtney and Milwaukee Heights as to traveling through to First and Alder Streets?

A. They do; yes sir.

Q. What is the fact as to passengers getting off at any point before they have reached those streets?

A. Very seldom.

Q. So that the travel I have cited is invariably through travel?

A. Yes sir.

156 Mr. CRAWFORD: What is your business?

A. Stone mason.

Q. How long have you been in that business?

A. 18 or 19 years.

Q. Have you ever worked on a railroad?

A. No sir.

Q. Have you ever run a street car?

A. No sir.

Q. Ever built a railroad in any shape?

A. No sir.

Q. Do you know anything about the cost of the service?

A. No sir.

Q. Do you know anything about the value of the investment in them?

A. No sir.

Q. Do you know anything about the value of the service to the passengers?

A. Well, for instance, if I was in a hurry to get somewhere I know the value.

Q. But you don't know the value of the service as rendered there as compared with the service at other places?

WITNESS: As compared with other divisions?

Q. Yes sir.

A. They have shorter rides. You can take the Woodstock, Montavilla and Woodlawn. You can get on a car at Montavilla and be 40 minutes coming into town as a rule and be a cold car and have to sit on straight seats, when you get one.

Q. Where is Montavilla?

A. East of East Portland.

Q. On what line is that?

A. Used to call it the "Montavilla".

Q. Who owns it?

A. The C. & S. Company used to own it but I guess it is all one corporation now.

Mr. GRIFFITH: You don't know who owns it?

157 A. No sir; I do not know.

Mr. CRAWFORD: Are you sufficiently well acquainted with the value of the investment, the cost of the service or the cost of the equipment to state whether or not a certain rate between any two points is a reasonable rate?

A. Well what might seem reasonable to me might not seem reasonable to you.

Q. What are the rates betwen those places?

A. Montavilla 5¢.

Q. How far is it?

A. I should judge it would be about six miles.

Q. Are the circumstances and conditions about the same?

A. No; quite a little difference in the circumstances. There used to be a car every 20 minutes.

Q. How about the physical conditions of the country?

A. I think we have a far nicer country.

Q. You do not think you have as easy a country to run through?

A. I don't know; the track runs through.

Q. You think it would be easier to run up where you are?

A. No; I think it the reverse.

Q. More level running on the Montavilla route?

A. Yes sir.

Q. How often do the cars go out there?

A. The cars run every fifteen minutes out there.

Q. How often do the cars run in the service to Oak Grove?

A. Every thirty minutes, but on the Montavilla in the afternoon—in the morning and afternoon they run at 7½ minutes intervals.

Q. What is the amount of traffic? Do you know anything about that as compared with the Montavilla line?

A. Well, the Montavilla carries I should judge a great many more passengers than the Oregon City line.

158 Q. You think the Montavilla line carriers more?

A. Yes sir.

Q. You may state what per cent more if you know enough about it to tell?

A. Well, that would be pretty hard for a man not particularly well versed in figures to give an estimate.

Q. Have you ever figured out any comparison of values for services between those two lines?

A. No sir.

Q. Have you ever figured out the difference in the amount of travel?

A. No sir, I have never figured out the travel.

Q. Have you ever figured out the difference in the cost of the service?

A. No sir.

Q. Do you consider yourself competent to do it?

A. No sir.

Q. You are just giving a guess about it?

A. Yes sir.

Q. Just taking a gamble at it?

A. That would be all.

Q. Now what would be the effect of a reduction in rates on the travel, if any?

Mr. GRIFFITH: I object to that as incompetent and immaterial. Not proper cross examination.

COURT: As the plaintiff went into an examination as to the increased building of houses I think it proper. Answer the question.

WITNESS: I don't know as that would make really any difference. When I went out there the car fare was the same as it is now. When I went out we paid a cash fare, but I cannot say whether a five cent fare would bring people out or not.

Q. Do you get a transfer on a commutation ticket?

A. We have a way; yes sir.

Q. How?

159 A. We have to buy a ticket from Sellwood to Center and that makes 10½¢; but by getting a transfer at Golf Links it brings it down.

Q. Do you know anything about the Mount Scott District?

A. Yes sir.

Q. Do you know what the fare was?

A. One time I paid 10¢ but the last time I paid a nickle.

Q. When did you pay ten cents?

A. 6 years ago.

Q. Well now, as a matter of fact, isn't it a fact that in the last three or four years those places on that line have grown up from two or three hundred to three or four thousand people?

A. Yes sir, I think so.

Q. Isn't it a fact that Milwaukee has not?

A. Yes sir, and I don't think it will as I understand it is the oldest city in the state if I understand statistics.

Q. Isn't there more people at Mount Scott than between Sellwood and Oregon City?

A. Undoubtedly must be.

Q. Now then, before the five cent fare was put in Mount Scott had from two to five hundred people.

A. I could not answer that question because when I went out there I went on business and as the business was right close to the car track I did not see much except right close around there. I attended to my business and went back.

Q. Have you talked over what your testimony would be here today with the railroad people?

A. Not just exactly as to what my testimony would be. I talked yesterday to Mr. Donahue, who subpoenaed me to be brought up here

Q. And they knew what the testimony would be?

160 A. They asked me whether I was satisfied with the conditions of things as they are standing today and if I wasn't I probably would not be there in Oak Grove.

Q. They asked you if you were satisfied?

A. Yes sir.

Q. Do you belong to the Oak Grove Association?

A. I used to but——

Q. You don't now?

A. No sir.

Mr. GRIFFITH: The Montavilla car line is entirely within the city limits of Portland, isn't it?

A. Yes sir.

(Excused.)

LOUIS E. ARMSTRONG, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: Where do you live?

A. Oak Grove—closer to Center Station.

Q. How long have you lived at Center or near Center?

A. A little over—between five and six years.

Q. Do you own a place out there?

A. Yes sir.

Q. State whether or not you travel frequently between Center and Portland?

A. Most every day. Not so much now. I have been home to work lately but then I work always in Portland.

Q. In traveling back and forth on the line between Portland and Center do you travel—do you buy commutation tickets?

A. Yes sir.

Q. How much do you pay for those tickets?

A. 8½¢.

Mr. CRAWFORD: If the Court please, we wish it understood—we don't want to keep objecting to testimony upon the reasonableness

of rates or commutation tickets that this is all under our
161 objections.

COURT: That is understood that all this testimony relating to commutation tickets and the reasonableness of the rates shall be taken subject to the objection of Counsel for defendants.

Mr. GRIFFITH: We want it before Your Honor so that it will be considered.

COURT: That will save time in objection to each question.

Mr. GRIFFITH: State, Mr. Armstrong, what induced you to take up your residence at or near Center?

A. Well, land was cheap and on a good car line. Did not have money enough to go anywhere else.

Q. State whether or not the matter of easy and cheap transportation to the place where you built at Center entered into the problem of deciding where to live?

A. Yes sir; that was one thing. We thought that was the cheapest.

Q. You thought the fare on this line was the cheapest?

Mr. GILTNER: I object to the counsel leading the witness

Mr. GRIFFITH: What other lines were you considering at the time you determined to buy on this line, that this line was the one you wanted to build on?

A. Well, we bought this land from a real estate man and he took us out on the Mount Scott road and that was the same as the straight fare where we are. It wasn't as good a car service. The cars were not as good and the road was better so we bought where we were.

Q. State whether or not you are satisfied with the commutation fare you are paying?

(Objected to.)

COURT: The general objection covers that.

162 A. So far as being satisfied, I am like a good many others, if we could get it cheaper we would like it better. We have had two or three arguments down there about that. My argument was that the city of Portland made the fare five cents to the city limits and I did not have gall enough to ask them to throw anything off the three and a half cents they charge us from the Golf Links out so let it alone.

Q. What is the fact as to whether or not the people who live out there and go to Portland as to whether they ride clear through to First and Alder Streets?

A. Always go to Alder Street. Sometimes they get out at Madison Street, two or three.

Q. State whether or not they ride through, as to traveling the full distance down to First and Alder Streets?

A. I think they generally go clear down.

Q. About what percentage, if not all?

A. I guess most of them do.

Mr. GRIFFITH: That is all.

Mr. CRAWFORD: What is the cash fare from Golf Links to Center?

A. I don't think I ever paid a cash fare there. I do not remember any case.

Q. How do you figure out 3½¢ between Golf Links and Center?

A. Our tickets are 8½¢ and the city of Portland makes the fare five cents to the city limits; that makes eight and a half cents. We had arguments in the meetings and I am just stating that was what I argued—that we could not ask them to throw off the three and a half cents.

Mr. CRAWFORD: I am not asking about that.

Mr. CRAWFORD: Do you get any transfer on commutation tickets?

A. I don't know.

Q. Did you ever get one?

A. No, sir.

163 Q. Have you ever ridden and never got a transfer?

A. I never asked for one.

Q. You know as a matter of fact they don't give one?

A. No, I don't think they do.

Q. Did you ever go from Lents to Portland? Do you know the fare?

A. I never paid my fare out—I have never been out there.

Q. It was never mentioned in these discussions you spoke of?

COURT: The witness is only able to give hearsay testimony on that.

WITNESS: I don't know how far it is from the Golf Links to the city.

Q. The people then from Lents would pay nothing from Lents to the city limits?

A. I think I heard something about that too.

Q. That is about three and a quarter miles, isn't it?

A. I don't know; may be it is.

Q. How far is it from Center to the city limits?

A. I don't know.

Q. From Center to the Golf Links?

A. I don't know. I believe it has been talked of as three miles; I don't know exactly.

Q. And there would be, you say, three and a half cents for that the way you figure?

A. The fare would be three and a half cents the way I figure it; yes sir.

Q. And if you have to travel without commutation tickets you would have to pay five cents more?

A. Ten cents, I think.

Q. And then five cents from there into the city?

A. I think so.

Q. Do you know how far it is from Portland to St. Johns?

164 Mr. GRIFFITH: Object to that as incompetent and irrelevant and as improper cross examination, etc.

Mr. CRAWFORD: I will withdraw that.

Q. What did you say your business was?

A. Carpenter.

Q. You never built a railroad?

A. No sir.

Q. Never worked on one?
A. No sir.
Q. Don't know what they cost?
A. No sir.
Q. Nor the value; nor the investment in that road?
A. No sir.
Q. The cost of the service, the cost of the service to the passengers or the value of the service to the passengers?
A. I don't know anything about it.
Q. Don't know the amount of money invested?
A. No sir.
Q. You don't know the amount of traffic?
A. No sir.
Q. You don't know what effect the reduction of rates would have on the line or anything of that kind?
A. No sir.
Q. Well then, you have no data, have you, upon which to base your opinion as to whether the rates are reasonable or unreasonable, have you?
A. I thought it was the most reasonable place I could get.
Q. I asked if you have any data upon which to base your opinion?
A. I don't know anything about that.
Q. In fact then you just took a thought at it without anything to base your opinion upon—any data?
A. Yes sir.
Q. That is the proposition then, isn't it?
A. Yes sir.
Q. Whom do you work for?
A. For myself now.
Q. Have you been working for this company who have brought this complaint?
A. No sir; I never did.
Q. Never worked on their buildings or anything of that kind?
A. Never worked for them a minute.
165 Q. Have you talked it over with Mr. Donahue about what you were going to testify about here today?
A. A little bit.
Mr. GRIFFITH: Did Mr. Donahue tell you what to think?
A. No sir.
Q. All he wanted you to do was to testify to the facts, wasn't it?
A. To the facts; yes sir.
Q. Now in making up your mind as to whether or not this rate you pay was reasonable, state whether or not you considered the fares charged for a like service elsewhere, in any other part of the country?
A. I don't know about that. I am not posted on fares other places at all—I don't know what it is. As far as I am concerned with that fare I am perfectly satisfied with that part of it.
Q. That fare is less than a cent a mile, isn't it?
A. Yes sir.

Mr. GRIFFITH: That is all.

Mr. GILTNER: We would like to recall Mr. Hill to ask him one or two questions.

Mr. GRIFFITH: Go ahead.

ISAAC HILL recalled.

Mr. GILTNER: I want to ask you if you have worked on a railroad or with one?

A. No sir; I never did.

Q. Have you any idea of the cost of their construction?

A. No sir.

Q. Don't know anything of the cost of service to the people of a railroad?

A. No sir.

Q. Or on different railroads?

A. No sir.

166 Q. And don't know the values of that road or other roads?

A. No sir.

Q. And don't know the value of the service given to the people; and don't know the amount of traffic over the road?

A. No sir; I don't know that.

Q. Don't know what the effect of an increase or reduction in the rates would have on a railroad?

A. No, I don't know.

Q. In some cases it might increase the traffic or the revenue and in other cases it might decrease them?

A. No sir; I don't know.

Q. You have no knowledge of those things?

A. No sir.

Q. Then in your opinion which you gave awhile ago you had no data upon which to base your opinions as to reasonable——

A. No sir.

Mr. GRIFFITH: Have you ever traveled elsewhere than on the line from Portland to Oak Grove?

A. Yes sir.

Q. Where else have you traveled?

A. To California and back east.

Q. And traveled on other electric roads?

A. Yes sir.

Q. In what particular parts of the country did you travel on electric roads?

A. Los Angeles and other towns.

Q. I will ask you in your experience in riding on other roads whether you considered that knowledge in basing your opinion of the reasonableness or unreasonableness of the rate you are now paying?

Mr. AITCHISON: Object to that as the United States Court in the case of Smyth vs. Ames, 165 and 166, etc., incompetent and irrelevant.

The COURT: The witness can answer this question and the

167 Court reserves its decision on the matter. (Ques. read to witness.)

WITNESS: I do.

Mr. CRAWFORD: What knowledge do you refer to, Mr. Hill?
A. The rates of fare I have paid on other transportation lines.
Q. In what places?
A. Los Angeles, San Francisco, and other towns.
Q. Do you know the value—do you know what those roads cost?
A. No sir.
Q. Do you know what it costs — operate those roads?
A. No sir.
Q. Do you know what it costs to hire conductors on those roads?
A. I have heard what conductors are getting—salary I mean.
Q. What you know?
A. What I have heard.
A. Do you know the volume of traffic on those roads?
A. No sir; I never made an estimate.
Q. You don't know what the investment was?
A. My car—the one I was riding in was crowded. The cars on many of the lines in Los Angeles are very much crowded.
Q. You don't know anything about the costs of the road?
A. No sir.
Q. You don't know anything about — the effect of an increase or reduction of rates would have; and, as a matter of fact, you have no data upon which to base your knowledge at all, or your opinion?
A. No sir.
Q. Do you know anything about the distance you rode?
A. I rode from the Central Depot of Los Angeles a distance of 26 miles for 50c, I think. That is, a dollar for the round trip. I am not positive but I think that is what I paid. They call it 25 or 26 miles from the Central Station to what is called Long Beach. I went over that line once.
Q. What other distances did you ride?
A. To Santa Monica, Pasadena and several other places.

168 Q. Then, as a matter of fact, Mr. Hill, in giving your opinion you have given you had no real data upon which to base it?

WITNESS: What do you mean, if you please by "data"?
Q. Why, I mean you did not know the cost of the road, the amount invested, the amount of traffic or the income of the road?
A. No sir; if I understood to say it would only be a guess.
Q. You don't know what the road is capitalized at?
A. No sir.
Q. And the only thing you base it on is *sht* amount of money you paid?
A. Yes sir; I know what I paid.
Q. And that is all you do know about it?
A. Yes sir.
(Excused.)

JOSEPH M. HART, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: State your full name and place of residence.
A. Joseph M. Hart; Milwaukee Heights is the Post Office.

Q. Near what station on the Oregon Water Power line?

A. I am nearest to Wetzler. The Heights on one corner an Wetzler on the other.

Q. How long have you lived there?

A. Two years about, the 2d of April next.

Q. Do you own the place there?

A. Yes sir.

Q. How much do you own there?

A. 13 or 14 acres perhaps altogether.

Q. What is your habit and custom, if you have such custom, in traveling to Portland on the line of the Oregon Water Powe
169 and Railway Company as to purchasing commutation tick ets? Do you purchase those tickets?

A. Yes sir.

Q. From what point do you take the cars?

A. Milwaukee Heights.

Q. What do you pay for those commutation tickets?

A. $1.50 for a book of twenty tickets.

Q. That would be equivalent to seven and a half cents a ride?

A. Yes sir; 7½c a ride.

Q. Do you know what the distance is in miles?

A. Not exactly, about three-quarters of a mile I think south of Milwaukee in my judgment. I do not know just exactly.

Q. State what reasons induced you to take up your rersidence at that point.

A. My health in the first place. I lived in the east and traveled out here on a tour and was told by my friends that this was a healthy climate here and my health was breaking down in the east and I moved here on account of my health.

Q. State whether or not the reasonableness of the commutation fare had anything to do with your taking up your residence there?

A. I don't know that ever entered my mind.

Q. What is the fact, Mr. Hart, as to your custom in traveling from Wetzler Station or Milwaukee Heights as to whether or not you travel the whole distance to First and Alder Sts.?

A. Most always travel the whole distance. Once in a while when I am putting up a building I stop off at the mills of the East Side Mill and Lumber Company.

Q. But you usually go on through?

A. To First and Alder Streets; yes sir.

Q. State whether or not it has been your observation, if
170 you have observed, as to what percentage of the passengers getting on at Wetzler and Milwaukee Heights as to traveling clear through to First and Alder Streets.

A. I think most of them do; nearly all of them do go on through.

Q. What is the fact, Mr. Hart, as to this commutation fare being reasonable or unreasonable in your opinion for the travel from your station into First and Alder Streets in Portland?

Mr. GILTNER: Objected to on the ground he has not shown himself competent to testify to that.

COURT: Answer.

A. I think it is reasonable and have no objection to it.

Mr. GRIFFITH: Take the witness.

Mr. CRAWFORD: How far from Wetzler Station to Portland?

A. I never measured it but I think it is something like 7 miles.

Q. Do you ride on commutation tickets?

A. Yes sir; from the Heights station.

Q. There is where you ride from, and you get commutation tickets?

A. Yes sir.

Q. You don't pay a straight fare?

A. Not unless I should happen to run out of tickets?

Q. Did you ever pay a straight fare?

A. Yes sir.

Q. What did you pay when you paid a straight fare?

A. Fifteen cents.

Q. A person who has no commutation ticket has to pay 15c.?

A. I don't know anything about anybody else.

Q. You don't have any idea you paid more than anybody else do you?

A. No sir; I don't.

Q. You think that is right then?

A. Yes sir.

(Mr. GRIFFITH: We have no objection to acknowledging that.)

Q. What business are you engaged in?

171 A. I used to be in business in the east but I have retired—I am a retired merchant.

Q. Never was in the railroad employ?

A. Oh; no sir.

Q. You don't know the cost of building a road?

A. No.

Q. Don't know the value of the investment in that road or any other?

A. No sir.

Q. Don't know the cost of the service to the passengers?

A. No sir.

Q. Don't know the amount of or the destiny of traffic, or the amount of it on that road?

A. Oh, no sir; I never figured that up.

Q. The cars are pretty well crowded aren't they?

A. I know they are in the morning and evenings, but through the day they run light.

Q. In the morning and evening they are crowded?

A. Yes sir.

Q. And you don't know what the effect would be of an increase or reduction of the rates?

WITNESS: May I answer that in my own way?

Q. You may answer whether you have any knowledge of the effect—whether you know how it does affect the increase.

Mr. GRIFFITH: I wish to reiterate my objection that it is not proper cross examination and if it goes in it goes in over my objection. There will be no exception if you will make this witness your witness.

COURT: You asked him on direct examination as to the reasonableness of the rate and he has asked if he has any data and I think he may answer—that is proper cross examination.

WITNESS: It would not me. I don't think I would go to Portland any oftener than I do this way.

Q. That is all your knowledge of that subject?

A. Why yes sir; I don't know about any one else.

172 Q. What is the fact—you state the straight rate from the place where you live to Portland is 15c. Now then, what is the straight rate from your place to Golf Links?

A. Well, sir, I don't know but I think it is 10c but I don't know.

Q. What is the distance?

A. I could not say as to that either.

Q. You don't know anything about the distance then?

A. I am not positive about it. I would not like to answer unless I did know.

Q. You consider then the 15c rate from your place (or the name of the place you named) to Portland is a reasonable rate, do you?

A. I said I considered the commutation rate reasonable and satisfactory.

Q. And what difference did you say there was between the two?

A. It is just half.

Q. Did you have any trouble with the company, or did the members of your family?

A. No, I never had any trouble. They hurt my wife last summer.

Q. They settled up, did they?

A. I don't know whether I have any right to answer that question.

COURT: Answer the question.

A. I would not have any interest in that case because my wife was hurt on my private crossing.

Mr. CRAWFORD: That is not the question.

A. I would like to ask the Court to let me explain that. She was struck by a car and they took her on a special car to Portland and to the hospital in an ambulance. They paid the hospital charges and doctor bill and I never got any damages. I did not ask for damages. I signed the papers in full.

173 Q. Did they give you any pass?

A. No sir.

Q. Give you any promises?

A. No sir; nothing. I signed the papers in full.

Mr. CRAWFORD: They got off pretty cheap.

A. That is my own business.

(Excused.)

JOHN B. BIGHAM, recalled.

Mr. CRAWFORD: You testified you were satisfied with the rates and service on that line, didn't you?

A. I certainly am; yes sir.

Q. How long have you been satisfied?
A. Well, I am satisfied really since I have been there.
Q. Did you have some trouble with the conductor on that road from being obliged to stand up, in which you gave the company a good blessing?
A. No sir; I never had any trouble with any conductor on the road.

Mr. GRIFFITH: Objected to as incompetent and irrelevant and as improper cross examination.
COURT: Answer the question.
(Answer noted above.)

Q. Did you ever make any complaint whatever to any of the passengers aboard any train on account of the service and especially to Mr. Snyder?
A. Well there was—I don't know unless it was a couple of years ago when they gave us slow service.
Q. And you are willing to testify you did not put a board over two seats but the conductor made you put it up?
A. I did that. I used to take my little board and laid it
174 across the seats, but I had no trouble.
Q. Why did you do that.
A. To have a seat in the car and to have a little sport.
Q. And that kind of service you are satisfied with?
A. The service at that time?
Q. I asked if you were satisfied with that service.
A. No sir; I cannot say I was satisfied with that service.
Q. Do you know how many people came out on the 5:30 car last night?
A. No sir.

Mr. GRIFFITH: Objected on grounds of improper cross examination.
COURT: Sustained the objection.
(Excused.)

FREDERICK HEGER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: Where do you live?
A. I live about 200 feet from Wetzler Station.
COURT: Where is that.
Mr. GILTNER: Near Milwaukee Heights.

COURT examines map.

Q. Do you own your own home?
A. Yes sir.
Q. How long have you lived there?
A. Five years.
Q. Have you owned a place there for the whole five years?
A. No; about four and a half years I have owned the place.

Q. Do you travel back and forth from your station to Portland frequently?

A. I have not for the last two years but the first two and a half or three years I traveled every day.

Q. State whether or not the commutation rates or fares the
175 two or three years when you did travel every day were the same as they are now.

A. They were the same as now; yes sir.

Q. State what induced you to take up your residence at or near Wetzler's.

A. I came from New York and wanted to buy me a nice agreeable home where we have a good solid car service and I must say where we live I am satisfied because our car is really the best of all the suburbs of Portland. Nicely heated and run faster than any. In fact they run faster than the train I came up to Salem on. We have had no accidents since I lived there, while on other branches they have heavy accidents. I went forth and back for about three months and I was satisfied that it was a benefit for any one living along there to buy a home. Of course I am perfectly satisfied if it is as it is now if they leave my station where it is. Should they, of course, take it off I should not be satisfied any more. And about the fare; I am satisfied too. I certainly would rather ride for nothing if I could.

Q. State whether or not the fare under these commutation tickets which you bought and travel with entered into consideration at the time you determined to build at Wetzler's. Did you consider the fares at all when you made up your mind to live out there?

A. No, I did not. The most particular reason was to have a home out in the country because I had lived in town for 20 years and I did not want to be bothered with my neighbors any more.

Q. State whether or not the fares you have been paying under commutation tickets have been reasonable and satisfactory to you?

176 A. I think that 8c. as I am paying now, is reasonable because I could see all the repairs they have to make in order to keep those tracks in good and safe condition, and, to tell the truth, I cannot hardly see how they could at first maintain those tracks as they did. That is the fact.

Q. Why?

A. Because they had so many repairs and so many fillings to do and the traffic was not very heavy at the time and I do not see just exactly how the company could afford to do it with the traffic they had.

Q. What is the fact, Mr. Heger, as to your custom in traveling from your home at Wetzler Station into Portland, as to whether you travel the full distance down to First and Alder Streets?

A. I buy, usually, two kinds of books. One book is straight through book Oak Grove to Portland for $1.60, 20 tickets; and one for $1.00, twenty tickets from my station down to Golf Links. I use about one book of each at the same time.

Q. Do you travel through to First and Alder Streets?

A. I travel through to First and Alder Streets, of course, if I use my through tickets; and if I don't I use my other book to Golf Links and pay my fare from there on.

Q. Where do you work?

A. I did not work for the last three years so I stayed home and am working on patents.

Q. What is your observation as to whether your neighbors and others getting on at Wetzler's and Oak Grove travel through to First and Alder Streets?

A. Well, my observation is that really very few get off between points.

Q. What do you mean by "between points"?

177 A. Between Oak Grove and Portland. That is a fact, because if I don't get a seat, or probably not a very comfortable seat, right at my station it is all off—I cannot expect to get a better one until I reach Portland.

Q. All passengers stay on the cars clear through?

A. Yes sir.

Mr. CRAWFORD: The cars pretty well crowded usually?

A. Mornings and evenings.

Q. Then the travel is considerable on the line?

A. That is very uncertain. Sometimes you get a good seat and sometimes they are crowded going out to the country and rush in and take up the seats but it is not steady that you can depend on through the day.

Q. Milwaukee is rather a suburb of Portland, isn't it?

A. It is; yes sir; I must say.

Q. Oak Grove also?

A. Oak Grove has become quite a little town in the last three years since I have lived there.

Q. Nickum and Lents are about the same relatively to Portland aren't they?

Mr. GRIFFITH: Object; improper cross examination.

Mr. CRAWFORD: Nickum and Lents are about the same in relation to Portland as Milwaukee and Golf Links are?

COURT: Just a minute. The defense could bring this witness on if they wished to and establish this fact, and I think it would be in the discretion of this Court. Under the discretion of the Court I think you can answer the question.

A. At the time when I come to Portland why Lents was a very poor place. That is true. Very poor; in fact a rock place; in fact I would not buy an acre for that matter. Of course it lies
178 all right but I admit that it has grown more than our district.

Q. And it is practically a suburb of Portland, is it?

A. Oh, Lents; Oh, yes sir.

Q. And so is Nickum, isn't it?

A. Yes sir.

Q. And Milwaukee?

A. Milwaukee, of course, is in a different county.

Q. But it is a kind of suburb to Portland?
A. Oh yes sir; we are part of it.
Q. The fare from Lents to Portland is five cents for a transfer State whether or not you don't think that had considerable to do with building Lents up.

Mr. GRIFFITH: That is under my objection if the Court wants to let it in—all speculation again.

A. Oh, I certainly say it is true. The fact is, as I mentioned before, nobody can deny that we have better cars than others.
Mr. GILTNER: Did you ever ride on the electric line on the west side from Portland to Salem?
A. No sir.
Q. Do you know the service they give?
A. I understand they charge $1.50.
Q. Do you know the nature of the cars?
A. I have examined those cars one day and they looked very nice to me.
Q. Better cars than you have, aren't they?
A. Probably in looking well, but as far as sitting more comfortable, I don't know.

COURT: I don't think that is proper cross examination about those cars.
(Excused.)

W. P. MULCHAY recalled.

Mr. GRIFFITH: You have stated you are the Traffic Agent
179 of the plaintiff company?
A. Yes sir.
Q. Do you have one of the tariffs of the company with you?
A. I have. (Handing counsel a tariff.)

Mr. GRIFFITH: I had a conversation with Mr. Aitchison one of the counsel for the defendant, and if it is agreeable it is understood that either party may consider any tariff on file with the Railroad Commission of Oregon as evidence in this case.
Mr. CRAWFORD: I would like a copy also.

Mr. GRIFFITH: I now hand you Passenger Tariff of the Portland Railway Light and Power Company marked O. R. C. No. 1 and will ask you if this tariff contains tariffs of all the rates now in effect on the lines known as the Oregon Water Power Division of the Portland Railway Light and Power Company?
A. Yes sir.

COURT: Admits tariff in evidence.
Mr. AITCHISON: We renew the objection as there is a supplement to that tariff which is not there.

Mr. GRIFFITH: Attached to the tariff which I now hand you is a sheet marked Supplement No. 1 to Passenger Tariff No. 1. Is that supplement a part of O. R. C. No. 1., supplementing it?
A. Yes sir.

Mr. GRIFFITH: I will ask that the tariff and supplement as above be introduced in evidence. (Marked P. R. L. & P. Exhibit 2)

Q. Mr. Mulchay, what is the tariff rate on the Mount Scott Division?

A. The rate to Lents is five cents; to Lents Junction 10c.

Q. On the line called the Mount Scott division how much of that line is within the city limits of Portland?

A. From 48th St. between the section line road and Mount Tabor Junction. It runs on the boundary line.

180 Q. What is the distance to where it crosses the city boundary from First and Alder Streets?

A. 3.41 miles.

Q. How many stations at which the Mount Scott cars stop are there between Mount Tabor Junction and Lents?

A. About 23 stations.

Q. What is the distance from Mount Tabor Junction to Lents?

A. 3.92 miles.

Q. Do you know the names of all the stations along there at which the cars stop?

A. Yes sir.

Q. And their distances from First and Alder Streets?

A. Yes sir.

Q. And their distance from Mount Tabor Junction?

A. Yes sir.

Q. I will ask if the statement I now hand you gives the distances between the different stations and First and Alder Streets, and from Mount Tabor Junction to the different stations?

A. Yes sir; I made that up.

Q. From what did you make that up?

A. From the distance table.

Q. From the distance table on file with the Commission?

A. Yes sir.

Q. Any change in fare anywhere along the line?

A. No change in fare.

Mr. GRIFFITH: We offer the statement in evidence. (Marked P. R. L. & P. Exhibit 3.)

Mr. CRAWFORD: You did not compare this with any survey?

A. No sir; I did not.

Q. You don't know whether it is correct or not then?

Mr. GILTNER: We object to it as hearsay evidence and not based upon any measurement he made. Not an original record, and therefore not the best evidence.

181 COURT: Mark it "P. R. L. & P. Exhibit 3." Subject to objection.

Mr. GRIFFITH: What is the fare on the Mount Scott Division from Lents to the station known as Lents Junction?

A. Five cents.

Q. What are the other stations starting from Lents and going easterly within the five cent zone from Lents?

A. Gates is the last station, I believe, within the five cent zone.

Q. How far is Gates from Lents Junction—I should say from Lents?

A. From Lents—2.29 miles.

Q. Gates is 2.29 miles from what? A. Lents.

Q. State whether or not the fare changes at Gates.

A. That is the point where it changes.

Q. And what is the change?

A. Five cents.

Mr. GILTNER: From where?

A. From Gates.

Mr. GILTNER: From Gates to where?

A. Including Jenne.

Mr. GRIFFITH: What is the distance from Gates to Jenne?

A. That is about two miles I haven't the tariff here.

Mr. GRIFFITH (handing witness tariff): I will call your attention to the tariff if that will help you.

A. 1.86 miles.

Q. What other stations, if any, are there between Gates and Jenne?

A I think there are two between. Wilson and Sycamore.

Q. Is the fare to Wilson and Sycamore from Gates the same as the fare to Wilson and Jenne?

A. Same; yes sir.

Q. Any other station to which the fare is the same?

A. One—Gilbert.

Q The fare is the same to Gilbert and Gates?

—. Same; yes sir.

Q. On the Springwater Division. At this time I wish to call your attention to the fact that on the map of the Portland
182 Railway Light and Power Company—state whether or not that is the Springwater Line?

A. That is the same.

Q. On the line shown on the map as the Cazadero line what is the distance from First and Alder Streets to Lents Junction?

A. On the Cazadero Line?

Q. Yes sir.

A. 10.71 miles.

Q. How much, if any, farther is it from Lents to Lents Junction on the Cazadero line that it is on the Mount Scott Division??

A. 2.41 miles greater.

Q. On the Cazadero line?

A. Yes sir.

Q. The same objective is reached by the two lines?

A. Yes sir.

Q. Now your tariff shows a fare of 10c. from First and Alder Streets on the Cazadero line to Lents Junction a distance of 10.71 miles; and it shows a fare of ten cents from First and Alder Streets to Lents Junction on the Mount Scott division, a distance of 7.93 miles. Why is that; why was the same fare provided?

A. On account of the junction where both lines come together. Both lines served the same points—the Cazadero line and the Mount

Scott line. Could not ask a higher rate on the Springwater Division than we could on the Mount Scott Div.

Q. In making up your tariff of fares on the Oregon City Division shown on the map, what distance was in each group of five cent fares?

A. About two miles; average about two miles.

Q. Is there any appreciable difference in the fare on the Springwater division from that on the Oregon City Division out as far as Jenne?

A. No sir. The only exception would be Nickum and Lents Junction.

183 Q. You divided up your line into groups with a five cent increase in fare in each group. Now the length of the groups, as I understand it, on the Cazadero line are about the same as the groups on the Oregon City line?

A. They are, with that exception.

Q. Explain that?

A. That is because from Lents to Lents Junction on the Mount Scott line we cannot ask a higher rate on account of two divisions converging at one point. Could not make a difference on that account.

Q. Because you must carry passengers on the Springwater Division to that same point for ten cents?

A. Yes sir.

Q. That is about the only exception?

A. They all average about the same with the one exception.

Q. What is the fact, Mr. Mulchay, as to commutation rates on the Springwater line. Are they the same as, or as low as, on the Oregon City line?

A. About the same or a little bit higher.

Q. On a mileage basis, I mean.

A. On a mileage basis they are practically the same. Probably a little bit higher.

Q. Do you attempt, in making your rates in the tariffs, to figure a fixed number of cents per mile, or do you figure from one station and grouping them?

A. That is the way the rates were made up I believe—in groups.

Mr. GILTNER: What is the fare from the depot on First and Alder Streets in the city of Portland to Nickum?

A. 5c.

Q. What is the fare from the depot in the city of Portland to Golf Junction?

A. Five cents.

Q. What is the distance between Golf Junction and Nickum?

A. The distance between Golf Junction and Nickum—I have not got that here, but I think it is about a mile and a half.

184 Q. What is the fare from Portland from the depot in Portland on the corner of First and Alder Streets to Lents on the Mount Scott division?

A. 5c

Q. What is the fare from the depot at First and Alder Streets in Portland to the city limits on the Mount Scott line?

A. Five cents.

Q. It is the same?

A. It is the same.

Q. What is the fare from the depot in the city of Portland—what is the distance on the Mount Scott line?

WITNESS: From 1st and Alder Sts. to the city limits?

Q. Yes sir.

A. 3.41 miles.

Q. What is the distance from there on to Lents?

A. From the city limits to Mount Tabor Junction 3.92 miles.

Q What is the fare from the depot in Portland to Milwaukee?

A. Ten cents.

Q. To Oak Grove?

A. 15c.

Q. To Center?

A. 15c.

Q. To Risley?

A. 15c.

Q. To Wetzler?

A. 15c.

Q. What is the fare from Portland to Golf Links?

A. Five cents.

Q. That is on the Oregon City division I am speaking of now.

A. Yes sir.

Q. You use the city limits as a basis do you not for grouping your suburban rates beyond? Isn't that a fact?

A. Yes sir; we would have to do that.

Q. Do you do it? You are compelled to accept only five cents within the city limits.

A. Yes sir.

Q. Therefore the basing of groups outside the city limits is from the city limits?

A. Yes, sir.

Q. And will you please tell the Court why it is you do not
185 charge anything from the city limits to Lents other than the five cents charged from Portland to Lents—why don't you? Just explain then how you harmonize with the city limits as a basis.

A. In the case of Lents it is not harmonious.

Q. Therefore you are carrying people, according to that, from the city limits to Lents for nothing?

A. Yes sir.

Q. For a distance of how many miles?

A. 3.72 miles.

Q. And you are charging the people who travel from Golf Links (the city limits) to Milwaukee five cents, are you?

A. Yes sir.

Q. A distance of how many miles?

A. Less than a mile and a half.

Q. And you are charging people to Oak Grove a distance of about three miles ten cents?

A. Yes sir.

Q. And the people of Risley, about the same distance, ten cents, are you?

A. Yes sir.

Q. Will you please tell this Court if that is not a gross discrimination against the people who live on the Oregon City line, when you charge the people who live in Lents from the city limits, a distance of 3½ miles, nothing; and you charge the people in Milwaukee, Oak Grove, Risley, five, ten and fifteen cents. Isn't it a gross discrimination against these people?

A. No, I don't think it is.

Q. Why?

A. Taking into consideration the travel on the Mount Scott division as against that of the other line.

Q. Isn't it a fact that the travel on the line was built up on account of the fact you gave a five cent fare to Lents?

A. That is true.

Q. Do you figure that you have a right to discriminate in
186 that way of your own act?

A. The conditions have brought that about. It was on account of the conditions. If the conditions were similar it would be the same.

Q. How long have you lived in Portland?

A. I have been here a number of years—19 years.

Q. Do you know what the population of Lents was prior to the time of the five-cent fare, approximately?

A. No sir; I never was out there.

Q. You do know that Lents, Oak Grove, Milwaukee and Nickum are suburbs of Portland?

A. Yes sir.

Q. And the railroad company so considers them, do they not?

A. Yes sir.

Q. And they base these rates upon the fact that they are?

A. Yes sir.

Q. Classify them as such?

A. Yes sir.

Q. Isn't it a fact that in the last four years Lents' fare has been cut in two and that the fare on the Oregon City Division has not been disturbed at all?

A I don't know what the general rates are on the Mount Scott division—I only know the five cent rate.

Q. Don't you know that three miles of road they have received a five cent fare since it was taken over.

A. Yes sir.

Q. How long have you been working for the company?

A. About four years.

Q. And didn't you fix the rate to Lents?

A. No sir; that rate was in effect.

Q. Don't you know from the records in your office?

A. That rate was in effect when I came to the office. The rate was in effect. I understand there was a change when the company took the line over.

187 Q. Don't you know the line between Lents and Mount Scott was boarded up by the people of Lents and was not operated?

A. No sir.

Q. You don't know anything about that?

A. No sir.

Q. From your knowledge and experience in visiting these places isn't it a fact that those stations from Anabel down have grown up and become pretty nearly a solid city?

A. Yes sir.

Q. And why was that; isn't it on account of a five-cent fare?

A. I don't know.

Q. You just testified that it was.

A. Possibly it was.

Q. Suppose you granted the city of Milwaukee on the Oregon City division the same privilege, would there not be a rush there?

A. I really don't know—that is presuming.

Q. Isn't it a fact that Milwaukee has remained about the same population as it was when you came with the company?

A. Yes sir; I believe it is.

Q. It is stagnant; isn't that a fact? Isn't that due to the fact that there is a ten cent fare there instead of five?

A. I don't know.

Q. Would that not be your judgment?

A. No, I don't think so.

Q. Isn't it just as pretty a place?

A. Yes sir.

Q. Isn't it just as nice a place to live?

A. I presume it would be; yes sir.

Q. How do you justify a rate of five cents from Lents to Portland with a transfer to St. Johns or to any part of Portland with a ten cent fare from the city of Milwaukee to the city of Portland without a transfer?

A. Well, that is about as I stated before,—due to condi-

188 tions. Probably not justifiable, except that it is due to conditions—the rate made on the Mount Scott Division.

Q. What are the conditions?

A. Contract conditions, I believe.

Q. That is the condition that justifies that, is it?

A. Brought about on account of the contract.

Q. And that is what you claim justifies that condition; is it?

A. Yes sir; that alone.

Q. You know that is an unlawful contract; don't you?

Mr. GRIFFITH: I object to that.

COURT: I hardly think that would be a proper question.

Mr. GILTNER: That is all.

Mr. GRIFFITH: Do you know anything about the values of lands out at Lents?

A. No sir.

Q. And the prices asked for the lands by the people of Lents and vicinity of Mount Scott, the lands as compared with Oak Grove and vicinity?

A. No sir; only that I have frequently heard that it was higher anywhere between Lents and Mount Tabor Junction.

Q. Practically right in the heart of the city?

A. Practically right in the heart of the city.

Q. These stations that have been established out to Lents have been established for the purpose of taking care of a very great volume of traffic, have they not?

A. Yes sir.

Q. Do you know how much that traffic is?

A. No sir, I don't.

Q. You say you believe that the five cent fare had something to do with it. Do you know whether that was a factor?

A. No, I don't know.

Q. You say that fare was in effect when you came to the company?

A. Yes sir.

Q. And you say that it was due to a contract which was
189 entered into?

A. Yes sir.

Q. I want to call your attention to what appears to be an inconsistency in the distances on the map, Exhibit 1. It appears upon the map that the Junction and not Section Line Road is the city boundary?

A. I believe that division runs right along there on the boundary line to the Section Line road.

Q. Then the Section Line road is the city boundary line and not the Junction?

A. Yes sir.

Q. What is the distance from Mount Tabor Junction to the Section Line road?

A. About .46 of a mile.

Q. So that the distance from the city limits to Lents is .46 of a mile less than you have heretofore testified?

A. Yes sir.

Q. What, if anything, do you know about the volume of traffic from this so-called suburb of Nickum to Portland?

Mr. GILTNER: Object to that as incompetent and irrelevant.

COURT: He can answer.

A. I don't know what that is but it is not very great.

Q. You have no knowledge of the volume of traffic there?

A. No sir; I know approximately only.

(Excused.)

J. J. MILLER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: What is your business?

A. Inspector on the Oregon Water Power lines of the Portland Railway Light and Power Company.

Q. How long have you been inspector?

A. About 3 months.

Q. What were you engaged in prior to that time?

190 A. Prior to that time I was a conductor on those lines for something over five years.

Q. On which lines?

A. All of them.

Q. As a conductor on all of the lines of the Oregon Water Power System?

A. Yes sir.

Q. And have worked steadily at that for five years?

A. Practically all that time.

Q. You are familiar with the volume of traffic on the different lines of the system?

A. In a general way; I am.

Q. For how long a time were you a conductor on the Oregon City division?

A. Something like three years altogether.

Q. What is the fact, Mr. Miller, as to the habit and custom of passengers boarding cars on the Oregon City division bound for Portland at any of the stations from Risley and north getting off before reaching First and Alder Streets?

A. Nearly all go to Portland; say 85% or 90%.

Q. What do you mean by Portland?

A. To West Portland—across the river.

Q. Are you familiar with the travel on the Mount Scott line?

A. Yes sir.

Q. How long were you a conductor on that line?

A. About six months quite a number of years ago but lately I have come in close touch with the Mount Scott Division being that my work is to a great extent on that line where the traffic is the heaviest.

Q. What is the fact as to the Mount Scott line running through the city a considerable distance?

A. We run through the city and stop at all street intersections between First and Alder Streets and Mount Tabor Junction.

191 Q. How many blocks?

A. 48th Street—in the neighborhood of 50—more than that—55 or 56 blocks.

Q. Do you know the distance in miles?

A. Not exactly; it is about three and a half miles.

Q. Stop at every street corner there running that distance, do you?

A. Yes sir.

Q. Is there any corresponding stretch of the Oregon City division where you make so many stops?

A. No sir.

Q. Are you familiar with the number of stations beyond Mount Tabor Junction to Lents?

A. About two dozen.

Q. How far is that?

A. About four miles.

Q. Is there anything like that number on the Oregon City division?

A. I think on the entire Oregon City line there is in the neighborhood of about 30 stations.

Q. And the Oregon City division is how long?

A. I think 15 miles and a half, or something like that.

Q. So that on three and a half miles on the Mount Scott division there are three-quarters at least as many stations as on the entire Oregon City division?

A. Yes sir.

Q. What is the fact as to there being any traffic offering on the Oregon City division from Golf Junction to First and Alder Streets.

A. A little but none to amount to anything.

Q. From a similar distance on the Mount Scott Division what would be the comparison of the traffic?

A. Be about 10 to 1 in favor of the Mount Scott district.

Q. What is the fact as to the Mount Scott Division carrying the greater or less number of short haul riders?

192 A. Well, you take it during the day after the busy morning travel all these Mount Scott cars will stop at all those streets and drop off passengers all along the line and pick them up as the case may be. There is quite a little traffic between the Mount Scott District and the Sunnyside District.

Q. Where is that?

A. Say between 28th and 48th streets.

Q. On the line of the Mount Scott Division?

A. Yes sir on the Harthorne Avenue—runs out through there and turns south beyond Lents.

Q. Where do you get the great bulk of the travel on the Mount Scott division.

A. Well, I think the bulk of our travel comes along between Hazelwild and Anabel—between those points is where we get the traffic. Of course I mean excluding the city business. I mean business on the Mount Scott cars excluding city business—excluding the business we get inside the city limits.

Q. That traffic is received between the stations of Anabel and Hazelwild?

A. Yes sir.

Q. What stations does that include?

A. Hazelwild, Kern Park, Arleta, Laurelwood, Stewarts, Myrtle, Archer Place and Anabel.

Q. What proportion of the travel on the Mount Scott line comes from the town of Lents?

A. Very small proportion.

Q. What proportion of the travel comes from the district on the Mount Scott division between Hazelwild and Lents?

A. Well, I believe about two-thirds of it.

Q. Between Hazelwild and Lents?

A. That is wrong. Probably one-fourth of it.

Q. Then three-fourths of the travel on the Mount Sdott Division originates or terminates going out at a point on the city

193 side of Hazelwild; is that right?

A. I think that is about right.

Q. What is the fact as to there being any intermediate travel on the Mount Scott line between stations?

A. There is quite a little.

Q. Is there any corresponding travel between Oak Grove and Portland?

A. No sir.

Q. Are you familiar with other city lines?

A. Not a great deal. All my work is confined to the Oregon Water Power Lines.

Q. What is the fact as to the passengers getting on the cars of the Mount Scott Division at Lents and riding through to First and Alder Streets as a rule?

A. Some of them do, of course.

Q. I am speaking now about the bulk of the travel.

A. How many or what per cent I am unable to say go clear through to the end of the line.

Q. Is there any record of that?

A. I don't see how it could be possible to keep a record of that.

Q. Tell the Court why.

A. Because you could not segregate the passengers who rode through and those who got off unless you had a man to watch where they went.

Q. So that must be merely a matter of your observation?

A. Yes, sir; a matter of observation, that is all.

Q. How much of the money is taken in on the Cazadero line from Nickum into Portland?

A. Well, there is not a great deal because only a few people live there. Nothing there to keep people around there.

Q. How long has that station been established?

194 A. Ever since the road was built.

Q. How long is that?

A. About four years ago in November.

Q. How long has the five cent fare on the Lents Line been in effect?

A. Over six years.

Q. And the five cent fare to Nickum four years?

A. Yes, sir; four years.

Q. How many houses are there at Nickum?

A. I am not prepared to say.

Q. What is the fact as to the passengers leaving Portland for points within the ten-cent fare limit getting off the cars before reaching Milwaukee, and if they do, what proportion of them in your judgment do leave the cars?

A. Only a few leave the cars. A few at Spokane Avenue and a few at Golf Links and the balance go to Milwaukee.

Q. And what proportion would that be?

A. I cannot say what proportion it would be. It would be small as compared with the whole travel.

Q. And to Golf Links is five-cent fare?

A. Yes, sir.

Q. Sellwood five-cent fare?

A. Yes, sir.

Q. And what proportion on the Mount Scott Division leave the car between Portland and Milwaukee—on the Mount Scott Division?

A. That district is not settled up; it is occupied by Italian gardens and the Golf Links.

Q. So that the travel is practically all limited to the ten-cent fare?

A. To Milwaukee; yes, sir.

Q. And on the 15 cent limit the travel is nearly all through. State whether or not that is the fact.

A. Yes, sir; it all goes into that 15 cent district between
195 Milwaukee Heights and Risley inclusive.

Q. State whether or not as a matter of fact there is any intermediate travel along that line.

A. Very little.

Mr. GILTNER: How many cars a day do you run to Nickum?

A. A car about every two hours.

Q. Seven a day?

A. Yes, sir.

Q. How many cars do you run a day to Milwaukee?

A. There is a car to Milwaukee every half-hour on the Oregon City line and a car every 15 minutes on the Sellwood line.

Q. How do you get off at Nickum?

A. Get off the car the same as they do anywhere else.

Q. How do they get up into the country?

A. Go up the steps.

Q. How many steps going up there?

A. I never counted the steps.

Q. When you get up there you are just on top of a knoll, aren't you?

A. Well, that is high ground around there.

Q. There are 272 steps up there, aren't there?

A. I don't know how many there are.

Q. You have a pretty good memory, have you?

A. I don't know whether I have or not. I guess when I get through with this you can tell better.

Q. Did you at any time, for the purpose of forming an estimate or for the purpose of testifying, compute the ratio of people that get off at the different stations between the city side of Lents and the City of Portland?

A. No, sir.

Q. Did you at any time, for the purpose of testifying, or for any other purpose, estimate the number of people that come from Lents compared with the number of people that come from the city side of Lents to the City of Portland?

196 A. No, sir.

Q. Did you at any time estimate or figure out the number

of people that come from Lents or that vicinity thereabouts and compare them with the number of people that come from Milwaukee, Oak Grove, Center Stations to the City of Portland?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you ever at any time compute the number of people that travel from Milwaukee to the City of Portland?

A. Not in a direct way. All the information I give here is all I gather or that comes in my work from day to day.

Q. It is guess work, isn't it?

A. If you want to call it that.

Q. You never paid any particular attention with that object in view, did you?

A. No, sir.

Q. Therefore you are not prepared to say how many people get off at Golf Links?

A. I am prepared in this way: that I am around on these cars all the time and I cannot very well help but notice where the bulk of the traffic goes to and from; where our cars are loaded the most and where they are practically empty. I certainly must be quite blind if I cannot see that.

Q. Do you know the amount of traffic on the Mount Scott line three years ago?

A. I know five years ago.

Q. What was it?

A. We handled all the business there with two cars.

Q. What do you handle it with now? That was before the five cent fare went into effect?

A. No, sir.

Q. How long had that been in effect?

A. Ever since I have been with the company.

197 Q. You handle it with two cars now?

A. No, sir; at that time.

Q. How many cars do you handle it with now?

A. Well, I would rather not say. During the morning and evening rush hours we run 7 trains of 2 cars in a train and 2 trains of single cars and one single car makes one single trip. Now that is between—it is from the time the people begin to travel in the morning, say about 5:45 until about 8:00 o'clock. Then we run 3 trains of 2 cars each and 2 single cars up to four o'clock in the evening; and then we run the double service again in the evening up until about 7 o'clock.

Q. Now, isn't it a fact that the increased travel is due to the five-cent fare?

A. I don't know what it is due to.

Q. What is your judgment—what is your observation? You have been giving your figures from observation?

A. It is due to the country settling up more.

Q. And that was due to what—the five cent fare?

A. No; people could buy property there at very advantageous rates. The fare, of course, may have something to do with it.

Q. Isn't it a fact that you could buy on the Oregon City line cheaper?

A. I did not know that.

Q. What did you pay for your home in Milwaukee?

A. I don't own any home in Milwaukee.

Q. You did, didn't you?

A. I never had any deed for it.

Q. What did you agree to pay for it? You aren't trying to keep anything back, are you?

(Objected to as irrelevant.)

(Objection sustained.)

Q. How is the character of the soil out around Lents as compared with the soil out around Milwaukee and Oak Grove?
198 Do you know anything about that?

A. I can give you my judgment.

Q. We want to know if you know.

A. I am not a soil expert so I had better not answer that.

Q. Was it possible for you—you knew you were coming here as a witness, didn't you?

A. I knew it at four o'clock last evening.

Q. Is there any way possible of telling the number of people that get off at any of these stations from any record of the railroad company?

A. On which line?

Q. On the Oregon City line.

A. No, there is no way of getting at it absolutely accurate but might make a pretty accurate estimate, but, so far as the registers are concerned, at the different stations the fare is the same and the fare would be duplicated.

Q. The Sellwood cars go to Milwaukee, don't they?

A. They are scheduled to go there.

Q. Do you know the number of people who go on the Sellwood cars to Milwaukee?

A. Yes, sir, there are quite a few.

Q. Do they haul a great number?

A. Not a great number, no.

Q. How many people from Sellwood ride to Portland on the Sellwood cars?

A. On an average we get 40 to 50 a trip.

Q. It is a separate division?

A. Yes, sir.

Q. And they carry people from Milwaukee to Portland, don't they?

A. Yes, sir.

Q. And the Oregon City Division carry people from Milwaukee to Portland, don't they?

A. Yes, sir.

Q. Now, if you know without guess work, what proportion of people travel on both of these lines from Milwaukee to
199 Portland? What is the proportion that travel from Lents and Annawel and the intermediate section to Portland? What is the ratio between the two?

A. Do you want what we get out of Milwaukee as compared with Lents—just Lents alone?

Q. Yes, sir.

A. I don't think there would be a great deal of difference; that is, with Lents alone.

Q. Then the circumstances and conditions are the same?

A. In one light.

Q. How about the track—is the track on the Mount Scott of a greater curvature?

A. The track from Milwaukee to Portland has less curves.

Q. Are they less expensive to operate?

A. Double track—in what way?

Q. Wear and tear on the cars?

A. I don't know as to that. It takes less cars to do the business to Milwaukee.

(Objection entered.)

Q. What is the comparison or ratio between the people carried from Oak Grove, Risley and Milwaukee to Portland—how do they compare on the Sellwood line and Oregon City line compare with the people that travel from Annabel on out to Lents into Portland, if you know?

A. You mean all the traffic that goes to Portland on the Oregon City line north of Risley as compared with all the traffic going to Portland over the Mount Scott line between Lents and Annabel?

Q. Yes, sir.

A. A great deal more.

Q. Do you know the proportion?

A. No, sir.

Q. Could not say from 3 to 1, or 5 to 1, or 20 to 1?

200 A. I would not attempt to make an accurate estimate.

Q. Pretty hard matter to tell?

A. Yes, sir.

Q. Then if it is a pretty hard matter to tell it must be about even?

A. That is not what I mean.

Q. What do you mean?

A. I mean as to the ratio.

Q. I was asking you as to the proportion.

A. I would not say.

Q. How many people has Oregon City, if you know—about 10,000?

A. About five or six thousand.

Q. Double that, isn't it?

A. I don't think so.

Mr. GRIFFITH: I understand you to say you could not tell the amount of travel on the Oregon City line north of Risley to Portland as compared with the amount of traffic arising at intermediate points on the Mount Scott Division.

A. I said I could not give an accurate estimate.

Q. You could approximate it, couldn't you?

A. Yes, sir; I think it would be about 6 to 1 in favor of the Mount Scott line. Now understand that right now; that is all

of the traffic originating on the Oregon City line north of Risley with the traffic on the Mount Scott line between Lents and Annabel.

Q. Bound for Portland in each case?

A. Yes, sir.

Q. And this traffic between Lents and Annabel arises chiefly between Hazelwild and Annabel?

A. Yes, sir.

Mr. GILTNER: Did you take the Sellwood line into consideration?

A. Yes, sir.

Mr. GRIFFITH: You said on cross examination that the Town of Lents gave about as much traffic to the line as the Town of Milwaukee. Is that correct?

A. I think that is about correct; that is, Lents alone, mind
201 you—just Lents alone.

Q. But on the Milwaukee line on the Oregon City line you get very few passengers north of Milwaukee into Portland and on the Lents line you get practically all of your travel after leaving Lents?

A. Yes, sir.

Mr. GILTNER: Isn't it a fact that you decided to take all the Sellwood traffic north of Milwaukee on the Sellwood cars?

A. We take as much as we can on the local line: sure.

Q. The cars run every ten minutes, don't they?

A. Every 15 minutes; morning and evenings they run every seven and a half minutes.

Q. Pretty good traffic?

A. Yes, sir.

Q. How does it compare with the Oregon City Division?

(Objection entered.)

(Excused.)

FREDERICK HEGER recalled.

Mr. CRAWFORD: When you were on the stand before I understood you to say something relative to taking the station away—removing your station. What was there about that?

COURT: Just what he knows. That is what the witness is to testify to.

A. It was the opinion of some of our neighbors but I forget really who it was. They said that, of course, if the company has to make quicker time and cheaper rates in order to make up for it, you know, a little bit, they might have to take out some little stations. Of course whether that was true or not or imagination from some parties I could not say, so therefore I made the remark that if the station was taken away which is on my land, or at the corner of it, I would be dissatisfied.

202 Q. What was it Donahue said about reducing the fare before long?

Mr. GRIFFITH: This witness did not testify in regard to that.

Q. What, if anything did Mr. Donahue say to you about a reduction before long anyhow?

COURT: Do you object to that?

Mr. GRIFFITH: Go ahead and take it.

WITNESS: Well, he simply said as soon as the company could do better and got more traffic it would naturally bring the fare down. That is all.

Mr. CRAWFORD: Did he say or use language to this effect: That they would reduce the fare before long anyway?

Mr. GRIFFITH: Before any statement could be considered by Your Honor as coming from this company it would be necessary to get the consent of this company.

(Witness excused.)

At the hour of 5:00 P. M. March 12th, 1908 Court adjourned to meet at 9:00 A. M. March 13th, 1908 at the same place.

Pursuant to adjournment Court reconvened at the hour of 9:00 A. M. March 13, 1908, and the following evidence was offered and received and the following proceedings were had:

J. J. MILLER recalled.

Mr. GRIFFITH: From your experience and observation of the traffic on the Mount Scott Division what proportion of the entire traffic arises within the city limits of Portland?

A. I should judge about one-third of it.

Q. Kindly explain to the Court what you mean by one-third of the entire traffic arising inside the city limits.

A. I mean by that, during the busy morning and evening
203 traffic—say on the evening traffic: We start out a train there of two cars and make no stops west of 48th Street. Both cars have a good load on. Then start out a local car after them and have a good load.

Q. What do you mean by a "local car"?

A. A car which makes all stops out to 48th Street—the other makes no stops. Therefore I figure about one-third of the people. One car has a load which unloads inside the city limits and the other two cars have a load that go beyond the city limits.

Mr. CRAWFORD: Those people who go outside of the city in the evening are the people who live outside the city and come to the city in the morning to labor?

A. Yes, sir.

Q. And then that traffic that goes outside of the city in the evening arises outside of the city in the morning?

A. Undoubtedly.

Q. Do you know about how many people ride on the Oregon City cars during the evening?

Mr. GRIFFITH: I object to that as improper cross examination.

COURT: Answer the question.

WITNESS: What do you want to get at?

Mr. CRAWFORD: Say between five and six o'clock—the proportion

to the whole amount during the day. The whole number I should say instead of amount.

A. Be- five—there is one at 5:30 and 6:00. Either one of the three cars take a full load of passengers.

Q. And about how many people would it take to make a full load of people on those cars?

A. The seating capacity of those cars; they hold about 56 people.

Q. And about how many more can crowd on by standing up?

A. About as many more.

204 Q. Quite frequently those evening cars are crowded, aren't they?

A. Yes, sir; say half the time it is.

Q. Now then where do these people get off the cars usually in the evening on the Oregon City Division?

A. Most of the people leave (of course there would be a few leave the car at Spokane Avenue and Golf Links) but the great majority of those people go to Milwaukee and beyond Milwaukee.

(Excused.)

Mr. GRIFFITH: I desire at this time to offer in evidence the traffic or traffic sheets of the Oregon Electric Railway Company, marked O. S. C. No. 1. Is there any objection?

Mr. AITCHISON: We object as incompetent, irrelevant and immaterial. (Marked P. R. L. & P. Co. Exhibit 4.)

Mr. GRIFFITH: I offer this in evidence for the purpose of showing the rates charged by the Oregon Electric Railway Company between the City of Salem and for the express purpose of showing the rate of fare charged by the Oregon Electric Railway Company is 3¢ per mile over the entire line—at least 3¢ per mile. Under the stipulation it goes in.

Mr. GRIFFITH: I also desire to offer in evidence the tariff sheet of the Astoria & Columbia River Railroad Company R. C. O. No. 32 for the purpose of showing the rates of fare between the various stations on the line of railroad of this company within the State of Oregon. (P. R. L. & P. Exhibit 5.)

Mr. GILTNER: Objected to as incompetent and immaterial and not the best evidence. (Marked P. R. L. & P. Co. Exhibit 5.)

Mr. GRIFFITH: I desire also to offer in evidence the tariff of the Astoria & Columbia River Railroad Company on its Astoria-Seaside Division, No. R. C. O. No. 33 for the purpose of showing the rates of fare collected by the railroad company on that division of four cents per mile. (P. R. L. & P. Co. Exhibit 6.)

205 Mr. GILTNER: Objected to as incompetent, immaterial and not the best evidence.

Mr. AITCHISON: The tariff shows certain rates shading up to 2½¢ per mile.

Mr. GRIFFITH: For the purpose of acquainting Your Honor with the part of the case as made out with the Railroad Commission of Oregon I desire to read that contract as it appears in the transcript as on file with the Railroad Commission of Oregon. (Reads Lents contract.)

(Objected to as incompetent, irrelevant and immaterial, "and it

is a contract in direct violation of the laws of the State of Oregon and against public policy and void.")

Mr. GRIFFITH: My purpose in reading that to you, Your Honor, is to have a better understanding of the reasons for establishing a five cent fare to Mount Scott and Lents in the beginning.

Mr. GRIFFITH: I now offer in evidence the transcript of the proceedings before the Railroad Commission of Oregon in the case of The Oak Grove Improvement Association by B. Lee Paget as Relator vs. Portland Railway Light and Power Company filed in this Court on March 12th, 1908, saving any objections on behalf of any defendant as to incompetency and objected to at that time. (Marked P. R. L. & P. Co. Exhibit 7.)

Mr. GRIFFITH: I also offer in evidence the transcript of proceedings before the Railroad Commission of Oregon in the case of The Town of Milwaukee, a municipal corporation, vs. Portland Railway Light and Power Company, a corporation, filed in the Circuit Court for Marion County the 12th day of March, 1908, saving any objections as to the incompetency, immateriality and irrelevancy
206 of the evidence and objected to by the railway company at that time. (P. R. L. & P. Co. Ex. 8.)

Mr. CRAWFORD: And that said transcripts just offered in evidence are subject to any and all objections as to incompetency, immateriality and irrelevancy which may be made by the defendant herein and make take or make such objections any time during the pendency of this trial.

Mr. GRIFFITH: I have no objection to that provided the same is accorded to the plaintiff, that we may take the same objection that may not have been objected to before.

Mr. GRIFFITH: That is all right and we waive the reading of that now.

W. P. MULCHAY recalled.

Mr. GRIFFITH: Are you familiar with the rates of fare charged by the Southern Pacific Company on its line from Portland to Oregon City?

A. Yes, sir.

Q. And to intermediate points between Portland and Oregon City?

A. Yes, sir.

Q. Do you know the distance between Oregon City and Portland and between Portland and intermediate points on that portion of its line?

A. Yes, sir.

Q. What is the distance on the Southern Pacific Company's line from Portland to its first stop going south?

A. That is the car shops; 3.47 miles.

Q. What is the fare on the Southern Pacific Company's line from Portland to the car shops?

A. 15¢.

Q. What is the next station south on that line?

A. Willsburg; 5.41 miles.

Q. What is the fare from Portland on that line to Willsburg?
A. Twenty cents.
207 Q. What is the next station south?
A. Milwaukee.
Q. What is the distance from Portland?
A. 6.92 miles.
Q. What is the fare?
A. 25¢.
Q. What is the next station south?
A. Clackamas.
Q. What is the distance from Portland?
A. 10.98 miles; 40¢.
Q. What is the next station south?
A. Paper Mill; 13.77 mi-.
Q. And the fare?
A. 45¢.
Q. And the next station south?
A. Oregon City; 15.47 miles; rate of 50¢.
Q. Those fares are for single passage—single trips?
A. Yes, sir; they have no round trips.
Q. How does the distance between Portland and Oregon City on the line of the Southern Pacific Company compare with the distance on the defendant's (plaintiff's) lines?
A. The distance on the Portland Railway Light and Power Co.'s line is 14.47 as against 15.47 miles on the Southern Pacific.
Q. What is the distance on the Portland Railway Light and Power Company's line to the Town of Canemah?
A. 15.47 miles.
Q. And the fare?
A. 25¢.
Q. And there is another station, I believe, on the line of the Southern Pacific Company—a station of East Portland?
A. East Portland; yes, sir, make stops there.
Q. What is the distance from the Union Depot to East Portland Station?
A. .64 of a mile.
Q. And the fare?
A. 5¢.

Mr. GRIFFITH: I desire at this time to offer in evidence the Local Passenger Tariff of the Southern Pacific Company system, Oregon Railroad Commission No. 31, for the purpose of showing the fares and distances on their line in the State of Oregon. Any objection?

(Marked P. R. L. & P. Co. Exhibit 9.)

208 Mr. AITCHISON: Same objection as before.
Mr. AITCHISON: The Southern Pacific Company is a steam road, is it not?
A. Yes, sir.
Q. Running from Portland to San Francisco on the line you mention, engaged in interstate traffic?
A. Yes, sir.

Q. You are familiar with the rates charged by the Southern Pacific Company to which you testified?

A. Yes, sir.

Q. Kindly state what the commutation rates are?

A. I am not prepared to state.

Q. Are you prepared to testify that they are not 60 rides for $5.00?

A. No, sir; I am not.

Q. And have they not an arbitrary bridge toll of 5¢ as charged?

A. I don't know; I believe there is.

Q. Can you not examine the tariff and see if there is not an arbitrary bridge toll of 5¢.

A. The distance, I believe, is .64 of a mile and the fare 5¢.

Q. And it is customary upon steam roads, isn't it to make such arbitrary charges for bridge tolls?

A. I believe it is; yes, sir.

Mr. GILTNER: Did you ever ride on the Southern Pacific Company's line to Milwaukee Station?

A. No, sir; not to Milwaukie; that wasn't my destination.

Q. Did you ever get off at this station that is called "Milwaukee" on the Southern Pacific Company's line?

A. No, sir.

Q. Did you not know it as a matter of fact that any person to get on or off at Milwaukee Station they must flag the train?

A. I did not know that; I never took the train there.

Q. Don't you know that the station they call " Milwaukee" is about 2½ or 3 miles from the City of Milwaukee?

A. I don t know what the distance is.

209 Q. It is about that distance?

A. I presume it is.

Q. And the Southern Pacific Company does not undertake to furnish service to the people of Milwaukee?

A. I don't know that but I presume they don't.

Q. Do they have any traffic there?

A. I don't know that.

Q. Do they have any traffic from the Car Shops to Portland?

A. I don't know that.

Q. Isn't it a matter of fact that because there is an electric line runs within a hundred yards of it they don't?

A. There is one there.

Q. And everybody takes that electric line?

A. I presume they do; I don't know.

Mr. GRIFFITH: The electric line referred to is the electric line of this company?

A. Yes, sir.

Q. And people take that because the rate is lower?

A. I presume they do.

Mr. AITCHISON: Isn't that the Portland Railway Company?

A. Portland Railway Light and Power Company.

Q. At the Car Shops?

A. Portland Railway Company.

(Excused.)

C. N. HUGGINS, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Mr. GRIFFITH: What official position do you occupy with the Portland Railway Light and Power Company?

A. Treasurer and Assistant Secretary.

Q. How long have you occupied those positions?

A. Those very positions for only within the last 60 days.

210 Q. And what position did you occupy with the Portland Railway Light and Power Company prior to that time?

A. Secretary.

Q. How long were you Secretary of the company?

A. Since the time of its incorporation, which I believe was June 30, 1906.

Q. Were you Secretary of the Portland Railway Light and Power Company at the time the system of lines known as the Oregon Water Power system was acquired by the Portland Railway Light and Power Company?

A. I was.

Q. And have been until the present time?

A. Until with- the last 60 days.

Q. State whether or not in your official duties you have charge of the books of the Portland Railway Light and Power Company?

A. I have.

Q. You have general supervision of all accounts of the company?

A. I have.

Q. Have you examined the books and records of the Portland Railway Light and Power Company for the purpose of ascertaining the number of passengers traveling upon the lines of the Oregon Water Power and Railway Company system?

A. Yes, sir; I have.

Q. You are familiar, Mr. Huggins, with the form of tickets sold by the company upon its different lines—round trip and commutation tickets?

A. I know the type of tickets sold.

Q. In your examination of the books and records of the company what did you find as the number of tickets——

Mr. CRAWFORD (interrupting): We object to that as incompetent and not the best evidence and the books themselves are the best evidence and we demand the books themselves. We will make as a further objection, etc. (*pp.* 26 book 2.)

211 COURT: The Court will sustain the objection. The books in existence will be the best evidence. The Court rather regrets the objection was made but sustains it.

Mr. GRIFFITH: In that case, Your Honor, I would ask for a continuance of this case until such time as we can bring the books here. I have no objection to bringing the books here.

Mr. GILTNER: Must this responsibility rest upon our hands? Are we compelled to go back home without terms upon these people? I say, if they want a continuance of this case that injunction ought to be dissolved as they are to blame for this delay.

COURT: The Court will not dissolve the injunction until this case is finally heard. It set the very earliest date for a final hearing. You have all opportunity to cross question this witness and bring out all the facts. If you insist upon it the delay will rest with the defense upon this matter. I want you to understand that.

Mr. GRIFFITH: One of the Counsel for the defense has suggested to me a method whereby we could avoid the necessity of bringing all of the books here. That is to say, we submit to the Counsel for the defense the statements we expect to produce and then that Mr. Aitchison or anybody else have the opportunity to make statements from our books and compare them with our statement. That would save the bringing of these books here and would accomplish the same purpose. (Mr. West and Mr. Aitchison appointed by the Court to examine the books of the plaintiff and prepare statements and compare with those of plaintiff; and if any particular difference should be found to bring the books to the Court.) (In re continuance: Mr. Giltner: The citizens of Milwaukee are really

212 the plaintiffs (defendants) in this case and The Railroad Commission of Oregon is merely nominal. These people are up here to testify. They are here at an expense and would be again. It is for you to determine whether we are right or wrong.)

COURT: The Court will reserve the decision on this motion with reference to the expense.

COURT: We will continue this case at 9:00 o'clock Monday morning, March 23d, 1908. Be prepared now to meet any emergency because there will be no continuance unless it be something very extraordinary.

Whereupon at the hour of 10:15 in the forenoon of the 13th day of March, 1908, Court stood adjourned to meet at 9:00 o'clock in the forenoon on the 23d day of March, 1908.

213 Pursuant to adjournment on the 13th day of March, 1908, this case again comes on for hearing this 23d day of March, 1908, at the hour of one twenty-five in the afternoon. Appearance the same as before.

Mr. GRIFFITH: If the Court please, there has been some discussion between the parties regarding the introduction of some evidence, particularly the contract between the Portland City and Oregon Railway Company and the Chicago, Portland & Mt. Scott Railroad Company, which contract was introduced and which is a part of the transcript of the evidence before the Railroad Commission of Oregon. It is stipulated that the plaintiff here, the Portland Railway Light & Power Company is a present holder of the said Lents contract, and that that contract was assigned to it by the Oregon Water Power & Railway Company, the successor in interest of the Portland City & Oregon Railroad Company.

Mr. CRAWFORD: That will be all right, sir.

Mr. GRIFFITH: It is stipulated that the franchises from the City of Portland to the Oregon Water Power & Railway Company, now owned by the plaintiff here and under which its system of railways

within the City of Portland is operated provide for a limit of five cents, covering any single fare in any one general direction within the City of Portland. I desire also, Your Honor, to introduce excerpts from the reports on file with the railroad Commission of Oregon from several different railroad companies operating within the State of Oregon, as to the average receipts per passenger per mile upon these different roads. I understand that counsel for defendant are willing to stipulate that these reports are actually made, and actually appear as in the reports on file before the commission.

Mr. GILTNER: I must object to this part. If that should
214 go into the record as counsel state "reports are as filed" that is getting evidence into this record that is not competent, material, or relevant, and is hearsay testimony.

COURT: I think then, Mr. Griffith, you can file them and let them go for what they are worth.

(Exception allowed.)

OSWALD WEST, witness produced on behalf of plaintiff, after being duly sworn, testified as follows:

Examined by Mr. GRIFFITH:

Q. You are one of the members of the Railroad Commission of Oregon?

A. Yes, sir.

Q. I hand you what purports to be the annual report of the Corvallis & Eastern Railroad Company, and ask you if that is the original report of that company as on file with the Railroad Commission of Oregon?

Mr. GILTNER: Objection, incompetent, immaterial, irrelevant, not the best evidence.

(Agreed that this same objection applies to all this testimony.)

A. It is the annual report of the Corvallis & Eastern Co. filed with the Railroad Commission of Oregon, as provided by law, the 23d day of October, 1907, and for the year ending June 30th, 1907.

Q. I will ask you to turn to page 61*a* and read the item thereon as you find it "average receipts per passenger per mile."

A. Average receipts per passenger per mile is given at
215 2.02731¢.

Mr. GRIFFITH: I would ask if your honor please, that the excerpts read from a report of the Corvallis & Eastern Railroad Company be received in evidence.

(Same objection as before.)

Q. I now hand you what purports to be the annual report of the Northern Pacific Railway Company and ask you if that is the original report of the Northern Pacific Railway Company?

(Objection.)

A. This is the annual report of the Northern Pacific Railway Company for the year ending June 30, 1907, filed with the Commission on October 10, 1907.

Q. Prepared by the Northern Pacific Railway Company?

A. Yes, sir, filed as by law required.

Q. I will ask you to turn to page 61*a* and read the item thereon as you find it "average receipts per passenger per mile."

A. The average receipts per passenger per mile is .02260¢.

Mr. GRIFFITH: I would ask that the report be received in evidence.

(Objection.)

Q. I now hand you what purports to be the annual report of The Oregon Railroad & Navigation Company, filed with The Railroad Commission of Oregon, and ask you if that is a report made by the railroad, and filed as required by law?

A. It is the annual report of The Oregon Railroad & Navigation Company for the year ending June 30, 1907, and filed with the Commission on October 21, 1907.

(Same objection.)

Q. I will ask you to turn to page 61*a* and read the item as you find it "average receipts per passenger per mile."

216 A. Average receipt per passenger per mile .02527¢.

Q. I would ask that the excerpts read from this report be received in evidence.

(Objection.)

Q. I now hand you what purports to be the annual report of the Southern Pacific Company, filed with the Railroad Commission of Oregon, and ask you if that is a report made by the railroad and filed with the Commission.

A. It is the annual report of the Southern Pacific Company for the year ending June 30, 1907, and filed with the Commission on October 19, 1907.

Q. Turn to page 61*a* and read therefrom the item "average receipts per passenger per mile" if you find that item.

A. The average receipts per passenger per mile as found on page 61 of this report are shown to be .02048¢.

Q. I will ask you to state, Mr. West, whether or not, that annual report represents the average receipts per passenger per mile on the line of the Southern Pacific Company within the State of Oregon or over the entire line.

(Objected to on the ground that witness is not competent to testify of his own knowledge. Therefore, not the best evidence.)

COURT: You can answer the question.

(Same exception.)

A. For the entire line of the Southern Pacific Company.

Q. What do you mean by the "line of the Southern Pacific Company?"

A. The entire line of the Southern Pacific system. I can explain that: these reports when they were gotten up follow out the forms used by the Inter-state Commerce Commission and we inserted leaves

for the purpose of getting information covering business
217 wholly within the State, and the Southern Pacific had not segregated their business within the state, so as to report on the business wholly within the State and they reported upon the whole system. Some of the other roads had segregated their accounts and reported as requested by states and by systems as well.

Mr. GILTNER: I also object to these as interstate on the grounds of incompetency and not to be considered in this case.

Mr. GRIFFITH: I would ask that the excerpts read from this report be received in evidence.

Mr. GILTNER: I would like to have added to that objection that this mileage is for interstate business and, therefore, we object to it on that ground and that it can't be considered for intrastate.

Mr. CRAWFORD: These reports to which you have referred and recited excerpts from are simply reports filed with your commission by the several railroad companies to which you refer, are they not?

Q. Yes, sir. And as to whether the matters therein are true or not, you have no knowledge?

A. I have not, other than those reports.

Q. And you have never had occasion to investigate as to whether any one of them was correct, have you?

A. We have had occasion to examine some of them that were filed with the commission to see whether they were correct or not, but as to whether these have been examined, I think not.

Q. You have not examined the original records or books of any of these companies for that purpose, have you?

A. No, I have not—that is, not for the purpose of checking these accounts.

218 Q. You could not tell, then, whether the excerpts to which you have testified are, in fact true or not?

A. No, sir.

Q. You have no knowledge whatever on the subject then, have you?

A. No, sir.

Mr. GRIFFITH: These reports, however, are prepared on the form required by the Railroad Commission of Oregon and in accordance with the act of the Railroad Commission of Oregon.

A. Yes, sir.

Witness is excused.

C. N. HUGGINS, witness produced on behalf of the plaintiff, after being duly sworn, testified as follows:

Examined by Mr. GRIFFITH:

Q. Have you prepared a statement, showing the number of tickets sold by the Portland Railway Light & Power Company during the year 1907, between Portland and Milwaukee, and between Portland and each of the following points, Milwaukee Heights, Oak Grove, Center, and Risley, and Center.

A. I have had such a statement prepared, yes sir.

Q. I now hand you a statement which purports to be a statement of such fares and tickets, and ask if that was prepared by you?

A. Yes, sir.

Q. That is a statement headed "Portland Railway Light & Power Company, statement of tickets sold Portland to various stations reduced to a one-way ride basis." Is that a statement of the
219 fares sold, as shown upon the statement correct?

A. It is.

Q. State whether or not the statement now in your hands has been checked by Commissioners Aitchison and West, in accordance with the order of the court?

A. Yes, sir, it has been.

Mr. GRIFFITH: I would ask to have this statement introduced in evidence (P. R. L. & P. Co. Exhibit 10).

Mr. CRAWFORD: I would like to ask a question of the witness. The question is, does this show the entire business of the system?

A. I don't quite understand what you mean by the entire business of the system.

Q. Does it show any thing more than what business is done between these points and from these points mentioned?

A. No, sir, it shows the ticket sales between those points.

Q. It doesn't show the business of the entire system?

A. Not at all.

Q. It doesn't purport to show the business on the Cazadero branch line?

A. No, sir.

Q. Only on this one division?

A. Only between those points.

(Objected to as incompetent, immaterial, and irrelevant.)

Mr. GRIFFITH: This statement covers the tickets sold between the different stations on the Oregon Water Power & Railway Company branch embraced and affected by the order of the Commission in the two cases now on hearing here, does it not?

A. I believe so. I don't know what that order was. It takes in all the business, all the ticket sales between Portland and
220 Milwaukee, Milwaukee Heights, Oak Grove, Center, and Risley.

Q. I would call your attention now, Mr. Huggins, to P. R. L. A. P. Co.'s Exhibit 10, and I would ask if you can explain why there is so great a difference in the number of commutation rate tickets sold from Milwaukee during the first seven months and the last five months of the year?

(Same objection.)

A. That is due to the closing of the Milwaukee Club.

Q. What was the Milwaukee Club?

(Objected to.)

Q. State whether or not the Milwaukee Club when it was in oper-

ation caused any increase in the passenger traffic along the line of the railway?

A. It did.

Q. To what extent?

(Objected to as statement introduced shows for itself.)

A. It apparently trebled the business to Milwaukee.

Q. You mean the operation of the club had the effect of trebling the railway business to Milwaukee?

A. Yes, sir.

Mr. GRIFFITH: I now hand you a statement headed "10c. and 15c. cash fares collected on Oregon City Line, year 1907," and ask you if that is a correct statement of the cash fares collected on the line of the Oregon City Division during the year 1907?

A. The statement is correct.

(Same objection.)

Q. This represents the total number of 10c. and 15c. cash fares collected on that line during the year 1907?

A. The Oregon City Line.

Q. State whether or not it refers to the cash fares or not?

A. Does on the Oregon City line.

221 Mr. GRIFFITH: I ask that the statement be received in evidence.

(Same objection.)

Q. To what group of stations does the 10c. fare apply?

A. As shown by this statement?

Q. Yes, sir, as shown by that statement.

A. That schedule of 10c. fares covers all ten cent fares collected regardless of the point they travel to or from. It was impossible to segregate the ten cent fares to Milwaukee from any other ten cent fares. Therefore, all ten cent fares collected on the entire Oregon City division are included in these figures.

Q. What is the fact regarding the fifteen cent fares as shown by this statement?

A. It is practically the same with regard to the fifteen cent fare; they are all fifteen cent fares collected on the Oregon City Division.

Q. The fare, I understand, is a ten cent fare from Portland to Milwaukee and fifteen cent- from Portland to stations in the Oak Grove group, and there are also ten cent fares between other stations on the line and fifteen cent fares between certain other stations on the line.

A. That is the case, yes, sir.

Q. Do you know of any way of determining just what the total of ten cent fares were between Portland and Milwaukee?

A. I have no means of determining that under our system of registering fares.

Q. And the same is true of the fifteen cents as applied to the Oak Grove group.

A. Yes, sir.

Q. As a matter of fact this statement includes in the ten and fifteen cent fares more fares than were actually obtained
222 between the City of Portland and Milwaukee of ten cent fares and between Portland and the Oak Grove group as to the fifteen cent fares?

A. Yes, sir.

Q. Now referring again to P. R. L. & P. Co.'s Exhibit 10, I call your attention to the statement at the foot of this report, showing the total number of tickets to Milwaukee for 1907 and for ten cents cash fare in the Oregon City Division for 1907, are the several statements at the foot of Exhibit No. 10 correct?

Mr. GILTNER: Let it be understood, if the court pleases, that we except — all this testimony in regard to these fares here as incompetent, immaterial, and irrelevant.

COURT: That is understood then. That objection will apply to all these.

WITNESS: The figures for this statement are correct.

Mr. GRIFFITH: Referring again to Exhibit 11, state whether or not this Exhibit 11 was prepared and checketd by the Railroad Commissioners, Aitchison and West?

A. It was checked by the Commissioners; it was prepared by me and checked by the commissioners.

Q. From the books of the company?

A. From the books and record of the company.

Q. I now hand you a statement headed "Revenue passengers carried on Mount Scott Division during year 1907" and ask you if that is a correct statement as to the number of passengers carried on that division.

(Same objection.)

A. That is correct.

Q. State whether or not this statement was also checked by the Commissioners, West and Aitchison?

A. It was.

223 Q. From your original books and records?

A. From the original books and records of the company (P. R. L. & P. Co. Exhibit 12).

(Same objection.)

Mr. GRIFFITH: I now hand you a statement bearing caption "Earnings O. W. P. & Ry. Company," for the year 1907, and will ask you if that statement is correct?

(Same objection.)

A. It is correct as to the totals; I am unable to say whether the monthly showing is correct or not. I did not prepare the statement.

Q. Who did prepare the statement?

A. The commissioners.

Mr. GRIFFITH (addressing counsel): Are you willing this should go in as a statement of the commissioners?

Mr. GILTNER: We will admit they made it, but we will not admit that it is competent. We will admit Messrs. West and Aitchison made that from the books, but as to the competency, we do not admit it.

Mr. GRIFFITH: You say the totals are correct for the year?

A. Yes, sir.

Mr. GRIFFITH: I ask that this statement be received in evidence and marked as P. R. L. & P. Co. Exhibit 13. (Exhibits 10, 11, 12, and 13 read to the court when introduced, and explanations made.)

(Objection, Exc.)

Mr. GRIFFITH: I now hand you a statement bearing caption "Operating statistics freight department O. W. P. & Ry. Company for calendar year, 1907," and ask if you prepared that statement?

A. Yes, sir.

Q. Are the statements made therein correct?

A. They are correct.

224 Q. As taken from the books of the company?

A. They are correctly taken from the books of the company.

Q. Is this statement also checked by Commissioners, West and Aitchison, from your books or records?

A. Yes, sir.

Q. I will ask that this statement will be received in evidence and marked P. R. L. & P. Co. Exhibit 14.

(Same objection.)

(Read and explained to the court.)

Mr. GRIFFITH: I now hand you a statement bearing caption "Operating statistics passenger department O. W. P. & Ry. Company for Calendar year, 1907," and ask you if you prepared that statement?

A. Yes, sir, I did.

Q. Is that statement correct as taken from the books of the plaintiff company?

A. It is.

Q. Was this statement also checked by Commissioners, West and Aitchison, from the books of the company?

A. It was.

Q. I would ask that it be received in evidence and marked P. R. L. & P. Co. Exhibit 15.

(Same objection.)

(Read and explained to the court.)

Mr. GRIFFITH: I now hand you a statement bearing caption "Operating statistics all department- O. W. P. & Ry. Company for calendar year, 1907," and ask if you prepared that statement.

A. I did.

Q. Is that statement correct as taken from the books of the plaintiff company?

A. That is correct as applying to railway earnings. It does not include power earnings—it is correct as showing the railway earnings.

225 Q. Upon what portion of the railway?

A. Upon all of the railway system of the Oregon Water Power division of the Portland Railway Light & Power Company.

Mr. GILTNER: Does that include the whole or is it merely the O. W. P. & Ry. Company division.

A. It is merely the O. W. P. division.

Mr. GRIFFITH: Was this statement checked by commissioners West and Aitchison, from your books and records?

A. Yes, sir.

Q. I would ask that this statement be received in evidence and marked P. R. L. & P. Co. Exhibit 16.

(Same objection.)

(Read and explained to the court.)

Mr. GRIFFITH: Does this statement, Exhibit 16, include any expenses for interest upon bonds of the railway company?

A. No sir.

Q. What does it include in the matter of expenses?

A. It includes merely the operating expenses, the taxes, and the maintenance of the lines of the company.

Q. Do the expenses as shown here include any charge for depreciation of the road or equipment?

A. No, sir.

Q. A question was asked you when you were last on the stand regarding the report filed with the Railroad Commission of Oregon, and as to the statements therein made, regarding the inability to comply with certain requirements of the Railroad Commission of Oregon. At that time you were interrupted in making your answer. I will ask that the witness be given an opportunity to answer.

(Objected to as incompetent, immaterial and irrelevant.)

A. I don't quite understand the scope of the question and
226 I don't understand exactly what you mean by it.

Q. I don't think any body did at the time. But the question was asked at the time and the point I wish to speak about now was the objection made by the Attorney General when you were last on the stand, on the ground that you had reported to the Railroad Commission as they had required, and the Attorney General said you were about to give a statement about something you said you could not give.

A. It wasn't perhaps directly a question. The statement was made to the court that myself as a witness had stated to the Railroad Commission, in submitting a report or following a report submitted that the railway company did not have the information on the books to show what it was supposed we were going to show in a statement to be submitted to the court at that time. I will explain that the affi-

davit in the report made to the commission covered the twelve months ending June 30, 1907. During the first six months, the property was owned and operated by the O. W. P. & Ry. Company, and the last six months it was owned and operated by the Portland Railway Light & Power Company. I stated in my letter to the commission that the Portland Railway Light & Power Company could not furnish the information because of the fact that the O. W. P. & Ry. Company which owned and operated the property for the first six months did not keep any books to show that information. That information was correct at that time, and it is correct today, and had nothing whatever to do with making the statement.

Mr. GILTNER: You had that information, however, for the six months and did not get it.

227 A. We were not asked to give it. We told them we could not give it for the year. In that letter I specifically mention the ownership of the O. W. P. & Ry. Company and distinctly wrote that it was operated by that company during the first six months of the year 1907.

Mr. CRAWFORD: The exhibits which you have testified to as having been prepared by you or under your direction, being numbered 11 to 16 inclusive, you say were prepared from the books of your company.

A. From the books and our records.

Q. Books of account?

A. Books of the Portland Railway Light & Power Company.

Q. That corporation is the plaintiff in these suits, is it?

A. I understand so.

Q. Now then what particular railroads does that corporation operate?

A. It operates railways formerly owned and operated by the O. W. P. & Ry. Company.

Q. Just name them, please.

A. Only the Oregon Water Power & Railway Company's lines.

Q. Name the routes where they run—what lines are they?

A. I don't know that I can give you a specific description. It operates between Portland and Cazadero, Oregon City, Lents Junction, and Mt. Tabor Reservoir; instead of Oregon City I should have said Canemah and Golf Links Junction and through Sellwood.

Q. And St. Johns?

A. No, sir.

Q. And any other lines in the City of Portland that you have not mentioned?

A. Those are the only lines I can call to mind.

228 Q. And the lines you have spoken of include the railway within the City of Portland?

A. Over those divisions of railway, yes sir.

Q. Does it include any of the narrow ga-ge lines in the City of Portland?

A. It does not.

Q. And lines running from Alder and First Streets, south and east from the City of Portland?

A. Yes, sir.

Q. Over the Madison Street Bridge?
A. Yes, sir.
Q. Then you may state whether this same company owns the narrow ga-ge lines or has any interest in them within the City of Portland?
A. It does not own the narrow gauge lines; has no title to their properties.
Q. Does it have any interest in those lines?

Mr. GRIFFITH: I don't see the relevancy of how that is proper cross-examination and I object to it on that ground.
COURT: You may answer the question.
(Exception.)

A. It is interested as a stock-holder only.
Q. What percentage of its stock does this company own?
A. I cannot tell you what percentage—it has a large majority, however.
Q. More than half?
A. It has more than half.
Q. Doesn't it own practically all of the stock?
A. Yes, sir.
Q. Does it have any interest in the power plants at Oregon City?
A. By virtue of being a stockholder, yes, sir.
229 Q. And to about what extent does it have any interest in those power plants?
A. The same extent it has in the ownership of stock.
Q. Owns practically all of the stock?
A. Yes, sir.
Q. Has it any interest in the Cazadero Power plant?
A. Yes, sir.
Q. What interest does it have in them?
A. Owns it.
Q. Entirely?
A. Entirely.
Q. Does it have any interest in the St. Johns' plant.
A. There is no plant at St. Johns.
Q. Plant or railway line?
A. I have answered that.
Q. To what extent are they owned?
A. I have answered that question—that it is owned by the Portland Railway Company and the Portland Railway Light & Power Company is a stockholder of the Portland Railway Company.
Q. Do you know the capital stock of the Portland Railway Company?
A. I don't believe I do, off-hand.
Q. About six and one-half millions, isn't it?
A. I cannot tell you exactly.
Q. And the Portland General Electric Company has how much?
A. I could not tell you positively what that is.

Mr. GRIFFITH: Do I understand your honor that it is desired to have this evidence go in?

WITNESS: I would like to explain, Your Honor, that I did not bring any statement giving those figures.

230 (Same objection.)

COURT: There may be some question as to whether it is proper cross-examination, but you can answer the question.

(Exception taken.)

Mr. CRAWFORD: The same company owns this electric light plant here in Salem, doesn't it?

A. It owns control of the stock of the company.

Q. It controls it—they have one general office, don't they, for all of the business?

A. Yes.

Q. And it all goes there in a bunch?

A. I don't know what you mean exactly.

Q. Well it all goes into one general office—handled by one general office.

A. Yes, sir.

Q. There are not separate offices maintained for each on- of the business propositions?

A. That is the general office of all departments. There are certain portions of each department that are handled in another building.

Q. Some portions of the business of all departments is done in the general office.

A. Yes, sir.

Q. In fact, it is all done there?

A. Not all of it.

Q. But the bookkeeping and all of that is?

A. Yes, sir, in the general office.

Q. They have one treasurer?

A. Each company has a different treasurer. They have one secretary—not exactly the same one for each company.

Q. They have one general manager, don't they?

A. No, sir.

231 Q. They have one man who fixes all the rates all the time, don't they?

A. Which lines do you mean? I cannot tell you who fixes the freight and passenger rates for all lines.

Q. Doesn't Mr. Mulchay have charge of all of it?

A. He is traffic agent—I don't know exactly where his duties begin and end.

Q. Who else handles that?

A. He is the only one I know of.

Q. If a man wanted to find out something concerning rates, he would go to him, would he not?

A. I presume that he would.

Q. He would have to go to him, would he not?

A. I think so.

Q. If he wanted to find out something concerning rates he would be referred to Mr. Mulchay, would he not?

A. I judge so.

Q. Upon what basis then, if any, did you segregate or separate the cost of the operation for these different plants when you made out these statements?

A. That is a pretty large question. I could answer it in an explanatory way, more plainly, perhaps than could be brought out by forty questions.

Q. I wish to know the basis. Was not the basis upon which you determined that principle arrived at arbitrarilly?

A. No sir.

Q. What system, then, did you adopt?

A. I can tell you if you will permit me to answer it in my own way.

Q. I have asked the question, you answer it.

A. The departments or divisions of the company, or we will
232 say the three different companies, the Portland Railway Company, the Portland General Electric Company, and the Portland Railway Light & Power Company, which last company, you will please bear in mind, has been operating only the Oregon Water Power & Ry. Company branches, the three divisions of this company as mentioned are kept entirely separate one from another; they have their own work in the light and power department, but do no other work, except those, and all that expense is charged to the light and power department. The Portland Railway Company has its own work to do and those expenses are charged up to the Portland Railway Company, and the same thing is true of the Portland Railway Light & Power Company. That leaves out the general officers and their immediate assistants, by which I mean stenographers and private clerks, if they have any. It leaves three or four clerks who are engaged on general work. The division of the general officers and their assistants is made as between the Portland Railway Light & Power Company, the Portland General Electric Company, and the Portland Railway Company, in this manner: two-fifths of that is charged to the Portland General Electric Company, two-fifths is charged to the Portland Railway Company, and one-fifth to the Oregon Water Power & Ry. Company, and those clerks who are engaged partly in the Oregon Water Power & Ry. Company work and partly in the Portland Railway Company work are divided between the Portland Railway Company and the Portland Railway Light & Power Company. Does that answer the question?

Q. Why are those divisions so made?

A. It is an arbitrary division, based largely, although not
233 entirely, upon the proportion of the business returns. The general officers of the company, their wages, and their assistant's wages can only be divided on an arbitrary basis as they have been divided upon what has been considered a fair basis.

Q. Then there is no real rule or basis except that basis as arbitrarily established, is there?

A. I refer only to the general officers and their immediate assistants. The large part of the general clerical help is absolutely divided from those being engaged only upon the work of the one division.

Q. It is impossible to get an accurate estimate, except by using the arbitrary rule, isn't it?

A. I will answer, "yes sir"—that is, it was an arbitrary basis to the extent of the general officers.

Q. Now, of all of these three divisions you speak of, have you one common president.

A. No, they don't have the same president.

Q. Well they have one common manager, don't they?

A. No, they do not.

Q. Now, you may state who is Mr. Josselyn?

A. You mean what clerical position he occupies?

Q. Yes, sir.

A. He is president of the Portland Railway Light & Power Company.

Q. What connection does he have with the Portland General Electric Company?

A. First Vice-president.

Q. And how is it relative to the city line of the Portland Railway Company?

A. He is President of the Portland Railway Company.

234 Q. Then he is president of two and vice-president of the other?

A. Yes sir.

Q. And is the highest officer within the City of Portland or the State of Oregon representing each of these lines?

A. I suppose he would be so considered.

Q. That is, neither of these lines or corporations has an officer in Portland or the State of Oregon higher than Mr. Josselyn?

A. No, sir.

Q. Every one takes their orders from him if he chooses to issue any?

A. Yes, sir.

Q. I thought so. In all three of these lines this Mr. Mulchay—he gives the order for the estimates of rates, doesn't he, on each one?

A. No sir.

Q. He is the man who fixes them, isn't he?

A. I believe not.

Q. Who does then?

A. I don't think Mr. Mulchay has anything to do with the Portland General Electric Company.

Q. Who does?

A. Why, the general manager of the Portland General Electric Company.

Q. The railway system, I mean—for the Portland Railway Light & Power Company and the Portland Railway Company.

A. The Portland Railway Company has only a five cent fare.

Q. Don't do any freight business, then.

A. I don't know whether there is any on the little line running from Willamette Falls.

Q. But if there is any business there, then the question of rates would be referred to Mr. Mulchay?

235 A. I don't know.

Q. Now, on the other line how is it?

A. I think Mr. Mulchay establishes rates for the Portland Railway Light & Power Company. I don't know whether he has anything to do with the rates of the Portland Railway Company system or not.

Mr. AITCHISON: In the item of maintenance of equipment, there was no particular examination made, was there, of the particular items going to make up the total?

A. Of maintenance of equipment?

Q. Yes, sir.

A. Why, I think Mr. West drew up a statement of details.

Q. That is the sub-accounts?

A. The sub-accounts, yes sir.

Q. But the particular items were not gone into by yourself. In the maintenance of track and road bed, which amounts, perhaps to thirteen or fourteen per cent of the total, the same is true?

A. Yes, sir.

Q. Were there not items of considerable size you remember that contributed to the maintenance of the track way, maintenance of road way, and over head?

A. I think not—so far as I can recall.

Q. Did you not have trouble with the bridge at Oregon City last year?

A. I believe so—I think we did.

Q. It was totally wiped out of commission for a while wasn't it?

A. We did not operate for two or three days—I don't know exactly how long.

Q. Wasn't there trouble with the entire line of the Oregon
236 City division?

A. I don't know that there was.

Q. About the time of the silver thaw?

A. I don't recall it if there was.

Q. The matter of power has always to be more or less arbitrarily made up?

A. I think it has.

Q. Will you explain how it was made up, and why it is made up in that way?

A. The power cost is taken as in these reports—as it is figured at 9¼ mills per kilowatt hour. The kilowatt hour is measured by electrical appliances, and it is all measured by the power houses. That figure was taken because it was the lowest contract rate the company ever made. It was based on the contract made by the Portland General Electric Company with the Portland Railway Company in February, 1906, some little time prior to their being any ownership interest talked of between the two companies. It was based upon the probability that if the Portland Railway Company, in case of having no contract for power with the General Electric Company, would install a power plant, and become a competitor of the Portland General Electric Company, and the rate was made by the General Electric Company on the basis that the Portland Railway Company was the largest consumer of power tributary to the Portland General Electric Company's plants, and also having

consideration to the fact that by contracting with them, they were removing a possible danger of competition and upsetting more or less business and rates. That rate then was made for a long term of years, and it was the lowest rate we have been able to
237 learn of.

Q. That rate applied during January and February of last year?

A. Yes sir, it applied during January and February, and was used during those months for the power.

Q. And beginning with March you were working on a different basis?

A. In a different way, the rate remaining the same.

Q. For March and April?

A. Yes, sir.

Q. But from May on you have pooled the cost of the light and power with the Portland General Electric Company and the amounts that appear on the books are necessarily considerable smaller than appear in the statements?

A. Yes, sir.

Q. But the amounts don't take into consideration the profits on any investments of the Portland General Electric Company?

A. It is merely the cost of producing.

Q. Unless some fixed figure, like 9¼ mills was taken, it would also have necessitated a like inquiry into the Portland General Electric Company affairs, would it not?

A. Yes, sir.

Q. And the rate of 9¼ mills was made by the Portland General Electric Company at the time you had some knowledge of its affairs?

A. No, we had little knowledge of its real affairs.

Q. You yourself?

A. I had no particular knowledge of its affairs.

Q. But, of course, if the profit of the Portland General Electric Company was included in the 9¼ rate, it would make a
238 difference?

A. Yes, sir.

Q. And neither you nor the commissioners can tell what the actaul cost of the power furnished was to your company, taking into consideration the capital invested?

A. No sir.

Q. To that extent, then, the 9¼ mills is an arbitrary figure?

A. Yes, sir.

Q. You have deducted from freight for power about $950; now does that statement take into consideration the power which has been lost, if any?

A. I don't quite understand what you mean.

Q. You had taken the total amount of freight earnings and deducted about $950 for freight and the balance has been charged for passengers? There are leakages in power aren't there?

A. These figures were taken in accordance with the charge of the Portland General Electric Company. It is based upon that mileage. The same factors of loss would affect one as the other.

Q. The small proportion assignable to freight, then, was due to the fact you were using steam power?

A. Yes, sir. And they carried that on the Cazadero line where we were using steam locomotives.

Q. Now isn't it a fact that in the items of maintenance of way, conducting transportation and maintenance of equipment, certain general items for superintendence or foreman which cannot well be assigned to freight and passengers, except upon some arbitrary basis?

A. There is a little of that, but not very much.

Q. Let us take the item of maintenance of way. You can not tell, can you, whether the old superintendence—charged a pro-

239 rata?

A. Has been pro rata upon the basis of mileage for freight and passengers, for superintendence

Q. For superintendence?

A. Yes sir, for superintendence and all other repairs for track and road way, and all other maintenance in the same manner.

Q. Now as to maintenance of equipment, the items of superintendence, amounting to $1,379.50.

A. That only amounts to a little over $110 per month.

Q. Take the item of shop expense, $477.75.

A. That is a credit.

Q. You have made no examination to determine whether the items of shop expense and the manner in which they were distributed?

A. No, sir.

Q. And the fact was that the total amount so ascertained and the balance taken?

A. No, that applies, perhaps, to the superintendence, and possibly to shop expense. I again call your attention to the fact there is no charge to shop expense—it is a credit. All others are actually divided pro rata to freight and passengers, with this exception, that is for maintenance of equipment—that is for miscellaneous cars which are shop cars and other cars which are apportioned. However, we could not apportion that. We have thrown it all into that.

Q. What is the basis for the item of superintendence?

A. I don't know, there has been no division there. It is such a small amount per month it don't amount to anything.

Referring to the operating statistics, freight department,

240 O. W. P., during 1907:

Q. In your statement you have taken the total of maintenance of equipment and deducted the cost of freight and miscellaneous equipment, and the balance was assigned to passengers?

A. Yes, sir.

Q. And the whole superintendence, therefore, must go into passengers?

A. I told you, I don't know how that item was arrived at. I cannot state positively, but as I stated, it is so small it cannot affect the result in any way.

Q. But it appears from the exhibits in evidence that it was. Has there been any division, or does it only apply to passengers?

A. There has been no division.

Q. Now let us take the item of conducting transportation, and that item as you have testified, it includes the wages of superintendence and division foremen, conductors and motormen, and dispatchers and watchmen, cleaning and handling cars in the car shops, lubricants and wastes, car service supplies, cleaning and sanding track, and removal of snow and ice. (Exhibit 18.) Now those are expenses which go to both freight and passengers, aren't they?

A. Most of them.

Q. Which ones do?

A. Superintendence and division foremen, dispatchers and watchmen, car service supplies, cleaning and sanding track, removal of snow and ice.

Q. Those items have been segregated?

A. They have.

241 Q. On what basis?

A. Lubricants and wastes for the freight departments have been charged to express and baggage.

Q. Charged out of the shops?

A. Yes, sir, when used for freight cars or engines as taken out of the store.

Q. Take another item.

A. Superintendence and division foremen has been charged out in an arbitrary way.

Q. What is the basis of arbitrary division?

A. I think it was based on mileage.

Q. On car mileage?

A. On car mileage, yes sir.

Q. On car mileage for the months of December, January, and February last?

A. Yes sir.

Q. Is that true of the dispatchers and watchmen?

A. That is true of the dispatchers and watchmen also.

Q. How about cleaning and handling cars?

A. There is no division.

Q. How about cleaning and sanding track?

A. There is $1,591.02 charged of that for the year 1907—I cannot positively state. I suppose it is divided in the same way on the basis of mileage.

Q. But you don't know positively?

A. No, sir.

Q. Has there anything been introduced in evidence to show how those items have been segregated?

A. They don't show.

Q. Unless they have been, the manner they have been taken would throw them into passenger?

242 A. Yes, sir.

Q. You have testified to the manner in which the items of general expense is divided. Now, tell us about office expense and supplies.

A. There has been a great portion of the office expense and supplies—there is a great portion of it—of that expense, charged to

freight and express. It has all been charged direct to that account, not arbitrarily, but in accordance with the plan.

Q. Now advertising is a matter common to the freight and passenger?

A. No sir, we have not advertised in the freight department. Our advertising of the railway has been confined entirely to advertising special excursions, or advertising picnics or attractions at the end of the line, or something tending to increase the passenger business.

Q. But have you not gotten out circulars to induce people to locate along the line? I saw one.

A. I believe that is the only one we ever did get out.

Q. Now that affected freight transportation didn't it?

A. It, perhaps, contributed to the freight transportation, as well as passenger.

Q. That has been also assigned to passenger?

A. Yes, sir.

Q. What has been the legal expense, if any?

A. That legal expense was divided in with the general officers' salaries on the basis, in the first place, of one-fifth, and then that one-fifth subdivided on the basis of earnings, I believe. Mr. West divided those as between freight and passenger.

Q. The item of insurance, I understand, applies directly
243 to the class of equipment insured?

A. Yes, sir, the freight engines charged up separately.

Q. Now the item of miscellaneous, was that attempted to be segregated?

A. On an arbitrary basis. Only made that apply to the freight and express service. They were charged to that account, and if not they were charged to passenger account.

Q. You don't know of any better method of dividing those? You are obliged to use arbitrary figures to get any results whatever?

A. Yes, sir, that is it exactly.

Q. And the results depend upon whether or not the items are taken fairly and logically, represent the facts?

A. That is, so far as the items divided are concerned.

Mr. GRIFFITH: The statements which have been prepared and which have been introduced in evidence have all been checked up by Commissioners West and Aitchison, haven't they?

A. Yes, sir.

Q. Your books were open in compliance with the order of this court?

A. Yes, sir.

Q. And the statements, as prepared and introduced, were agreed to by the commissioners, as prepared and checked by the commissioners with the facts shown by your books?

A. Yes, sir.

Q. The arbitrary division between the several divisions, as mentioned by General Crawford, of the property owned and controlled by the Portland Railway Light & Power Company apply only to the general office expense?

244 A. They are.

Q. What proportion of the expense of the general officers

has been charged to the Oregon Water Power & Ry. Company?

A. One-fifth.

Q. And what does that amount to for the year 1907?

A. I don't recall that. I have a note of it there. (Exhibit 18.) $13,752.87.

Q. That was the amount of general expense arbitrarily charged to the Oregon Water Power system of railways as its proportion of the whole expense of the general officers of the three concerns?

A. Yes, sir.

Q. Were there any items of operating expenses in the statements of entire operating expense of the Oregon Water Power system of railways which was arrived at by an arbitrary division of expense with any other railway division of this company?

A. No, sir.

Q. Do all the different statements of operating expenses, which are in evidence here, with the exception of this one item of $13,752.87, apply solely to the operation of the O. W. P. system?

A. Yes, sir.

Q. Has there been any expense of operating any other property than the statements of the O. W. P. in these statements of operating expense?

A. No, sir.

Q. In the matter of the division of expense between freight and passenger, is there any portion of the expense of operating which is charged directly, and not by an arbitrary division to freight and passenger department?

245 A. Yes, sir.

Q. What is that?

A. It is the wages of all freight crews, conductors, engineers, motormen, brakemen, the various items of incidental expenses, such as rental of freight houses, the stationery used in the freight department, oil and waste used in the freight department, fuel and water for locomotives, signal flags, and many other items of the same nature used in the freight department.

Q. Those things are charged directly upon the books of the O. W. P. Division to freight expense?

A. Yes, sir.

Q. What proportion of the whole of the amount charged to operating expense, freight department, is charged directly into that account and not divided by an arbitrary division between passenger and freight?

A. The figures are there, but I believe about 90%, or upwards, are charged direct.

Q. So that not more than 10% is arbitrarily divided between passenger and freight?

A. I make that statement subject to qualification—I think about $58,000 charged direct out of a total of something like $64,000. That is my memory of the figures.

Mr. GRIFFITH: I now hand you a statement bearing the caption "Maintenance of way" and several sub-heads, and will ask you if

that statement was prepared from the books and records of the Portland Railway Light & Power Company?

A. It appears to be, but it was not prepared by me.

Q. By whom was it prepared?

A. Commissioner West.

246 Q. This was the statement upon which you have been cross examined by Mr. Aitchison?

A. Yes, sir.

Q. Mr. West prepared this statement from the books of the company?

A. Yes, sir.

Q. Regarding the item of power cost, concerning which you were cross examined as to whether or not 9¼ mills per kilowatt hour is a lower or higher rate than now charged by the Portland Railway Light & Power Company, or by the Portland General Electric Company, to other consumers of power, than the Portland Railway Light & Power Company.

(Objected to as incompetent and immaterial.)

(Objection overruled.)

WITNESS: The rate is lower than any other rate they have.

Q. Has there been any attempt or effort upon your part in preparing these statements, or any of them, to introduce into them any item of expense not properly chargeable to the maintenance and operation of the Oregon Water Power system of railways?

A. No, sir.

Mr. CRAWFORD: Did you make a big fill in the Oak's line in the year 1907?

A. Yes, sir.

Q. What did that cost?

A. I cannot tell you—a good many thousand dollars perhaps.

Q. Was that figured in the maintenance of way for the year 1907?

A. No, sir.

Q. Way and track?

A. No, sir.

247 Q. What would it figure in?

A. It is not in that statement at all.

Q. Why isn't it in the statement?

A. It did not belong there in the first place.

Q. I said, why didn't it?

A. It was a fill for permanent road ways, and at the same time providing a double track grade and it was charged into construction account.

Q. It was figured as an investment?

A. The trestle having been practically worn out, it was.

Q. You don't know what it cost?

A. I don't know what it cost.

Q. Probably a couple of hundred thousand?

A. No—not that much.

Q. You don't know how much was taken out of the earnings of the road of the system for that purpose?

A. None of it.

Q. Do you know what salary Mr. Josselyn receives from these various corporations?

A. I do.

Q. Please state it.

(Objected to as incompetent, immaterial, and irrelevant.)

COURT: Answer the question.

A. $15,000 per year.

Q. And that is charged with you said to what?

A. Two-fifths of the Portland General Electric Company, two-fifths to the Portland Railway Company, and one-fifth to the Oregon Water Power & Ry. Company.

Q. Mr. Fuller's salary is just the same, isn't it?

A. The same amount you mean?

Q. Yes, sir, and divided in the same way?

248 A. Not the same amount, but is divided in very much the same way.

Q. State what is the amount.

A. My recollection is it is $7,500 per year.

Q. The man who fixes the freight rates, he gets about the same, doesn't he, and it goes into about the same division, Mr. Mulchay?

A. I think Mr. Mulchay receives about $1,200 per year.

Q. You have a president over Mr. Josselyn and manager over him, somebody in the East?

A. Mr. Josselyn has the highest office in this country, except in the Portland General there is a president over him in the Portland General.

Q. His salary is figured in too?

A. The president of the Portland General does not draw any salary, as I recall it, at all. The president of the Portland General Electric Company does not draw any salary.

Q. He doesn't draw any?

A. No, sir.

Q. Who is the general manager of the Portland General Electric Company, and who gets the salary?

A. Mr. Josselyn, the vice-president, is the salaried man.

Q. And the Portland Railway Light & Power Company?

A. He is the president of that and draws a salary.

Q. And the Portland Railway Company, also?

A. Yes, sir.

Q. Does this $15,000 cover the salary he gets from the three companies?

A. It covers the salaries he gets from the three companies.

Q. That is all figured in?

249 A. That is all figured in.

Q. Isn't there any man above Mr. Josselyn in any one of these companies who draws a salary?

A. No, sir.

Q. That you are sure of? Then, Mr. Josselyn, of course, is the controlling spirit of all three companies?

A. Yes, sir.

(Witness excused.)

F. I. FULLER, witness produced on behalf of plaintiff, after being duly sworn, testified as follows:

Examined by Mr. GRIFFITH:

Q. You are vice-president of the Portland Railway Light & Power Company?

A. I am.

Q. And general manager of its railways?

A. General manager of the railway department.

Q. You are in direct charge of the railway system known as the Oregon Water Power?

A. I am.

Q. What is the length of the line, reduced to single track, of all railways in the Oregon Water Power railway system?

A. My recollection is, it is some thing a little over 95 miles. It is in the report of the Railroad Commission. There has been a slight addition since the last report. I do not carry the exact fraction in my mind. (Examines annual report) 95.53 miles.

Q. That includes all the lines of the railway of the Oregon Water Power Ry. Company?

A. All lines reduced to single track basis.

250 Q. Kindly describe or name the different divisions included in that mileage.

A. The line from First and Alder Streets to Cazadero.

Q. Called what?

A. The River division, which extends from First and Couch Streets to Golf Junction. The Springwater division extends from Golf Junction to Cazadero; the Sellwood division from Hawthorne to the corner of East Eleventh Streets, and Hawthorne Avenue to Golf Junction; the Oregon City division from Golf Junction to Canemah; and the Mt. Tabor division from East Portland, East Water Street to what is called Mr. Tabor Reservoir; and the Mr. Scott division from Mt. Tabor Junction to Lents Junction. That, with the side tracks and yard tracks, makes up the 95.53 miles with the double track.

Q. There is the Troutdale division?

A. There is the Troutdale division.

Q. How long is that?

A. About seven miles long, extending from what is now Linderman Junction to Troutdale.

Q. How long have you been engaged in street Railway business?

A. Street railway business?

Q. Yes, sir.

A. Since June, 1892.

Q. Have you or have you not had any experience in the building of railroads or street railways or inter-urban railways?

A. Yes, sir.

Q. Where have you had that experience?

A. On a great many extensions of the O. W. P. System—

251 extensions and reconstructions.

Q. Have you examined the O. W. P. system and are you

familiar with the character of the construction of that system of the railways?

A. I am.

Q. Are you also familiar with the amount and character of equipment on that division?

A. Yes, sir.

Q. Have you any experience in building, reconstructing, and constructing inter-urban street railways—had anything to do with the cost of such roads?

A. I have made a great many estimates of the cost and the completion of the most of the work, and have had figures containing that information.

Q. From your experience in street railway building and building of inter-urban roads, and from your knowledge and information concerning the O. W. P. divisions and equipment thereon, what would you say of the value of the O. W. P. system of railways with the equipment?

A. I should think as a matter of judgment, taking the whole system——

(Objected to as incompetent, immaterial, and irrelevant.)

COURT: Answer the question.

A. The cost of the O. W. P. system with its road beds, the value of equipment of the system, with its buildings and equipment, would be in the neighborhood, at a conservative estimate, of $30,000 per mile.

Mr. GILTNER: Single or double track?

A. That is on a single track basis.

Mr. GRIFFITH: What would you say, Mr. Fuller, as to whether that $30,000 per mile would or would not be a reasonable
252 estimate of the cost of reproducing that road in its present form?

(Same objection.)

COURT: Answer that question.

(Exception.)

A. I should say it would be a reasonable estimate.

Q. That is on the entire 95.53 miles.

A. Yes, sir.

Q. What is the fact, Mr. Fuller, as to whether the Oregon City Division, or any part of it, is more expensive of construction that other divisions of the railway?

A. Well the Oregon City division is more expensive than some of the other divisions, decidedly so.

Q. State whether or not, as a matter of fact, the Oregon City Division—average cost of construction of the 15.47 miles would or would not exceed the cost of constructing that portion of the system known as the Mt. Scott division.

A. It certainly would cost more per mile, because the work is heavier, and there is practically no bridge work to speak of on the Mt. Scott division.

Q. About how much more would it cost per mile—in percentage?

A. Well, I should think that as far as the track work is concerned, it would come to 50% more.

Q. Will you explain the reason for that to the court?

A. The Oregon City division has some very long fills—heavy fills, some expensive bridges, and average more for fill and excavation that the Mt. Scott division you refer to. I will state at this time there is nothing we know of in our records that would enable us to give exactly the excavations of cut and fill and grading work in these different lines, except lines we built. Some of the others, the records are not at hand. They did not come to us from the other company.

Q. State whether or not the expensive fills on the Oregon
253 City division occur between the town of Milwaukee and the City of Portland?

A. There are some heavy fills. It would include the one across the flat, which we call the Oak's fill, and a long trestle—there are heavy fills farther up the line.

Mr. GILTNER: That is what you call the Cazadero line?

A. We call that the River line.

Q. Isn't it a fact that you did call that the Cazadero line?

A. I don't think I did—the records will show that.

Q. The Cazadero cars go over the same road?

A. Yes, sir.

Q. And all these lines go over that same flat?

A. Some, but not all of them.

Q. Speaking of the Oaks, is that within the city limits of the City of Portland, or not?

A. No, sir.

Mr. GRIFFITH: If any, what experiene have you had, Mr. Fuller, while operating street railroads and street railways in the matter of depreciation of road bed and equipment?

(Objected to as incompetent, immaterial, and irrelevant.)

COURT: Answer the question.

(Exception.)

A. Well, in my experience, which has only been over a period of sixteen years, I have seen the larger portion or a great portion of the equipment and track of the original roads rebuilt.

(Objected to also on the ground that I think he ought to be confined to within the past year or so, at the time this contract was made with the Lents people.)

Mr. GRIFFITH: That was made in 1901, wasn't it?

—. ——.

254 Mr. GRIFFITH: From your experience in the department of road bed and rolling stock on electric roads, what do you say would be a reasonable charge for depreciation annually on the equipment of the O. W. P. division?

A. I think that about 10% on the electrical equipment for a year, and possibly 6% or 7% on the rolling stock would be a fair depreciation.

Q. And road bed?

A. On the road bed, would depend largely upon the line. If a road bed had no bridges and no timber construction, a small depreciation would do.

Q. Speaking of the O. W. P. system, would it be a reasonable charge on the whole system?

A. In my judgment 5% would be a very reasonable depreciation.

Q. By 5% would you include the entire road bed and equipment?

A. On the road bed and equipment.

Q. What, if any, improvements in the service on the Oregon City division have been made, Mr. Fuller, in the last year and a half?

A. Do you mean in the road bed?

Q. No in the service—have you shortened the time of the service or increased the number of cars?

A. A year and a half ago, the service to Oregon City was forty minutes, that is now thirty. It came about in two steps—first reduced to thirty-five, and then to thirty minutes. The service to Milwaukee, I think, during all of that time has been fifteen minutes.

Q. Has there been any change in the running time there?

A. Enough to make the change from forty to thirty minutes. It was reduced from an eighty minute run to a sixty minute
255 run.

Q. What was the fact of the Mt. Scott cars taking care of the traffic within the City of Portland?

A. A year and a half ago, and during all of that time, they have taken care of the local traffic all day long. Recently, at certain hours, they are running through cars then from East Forty-eighth Street, which make no stops.

Q. During the remainder of the time those cars take care of the local traffic?

A. They do.

Q. Over how long a stretch of track?

A. About three and one-half miles.

Q. Are you familiar with the railways of the Portland Railway Company?

A. I am.

Q. What is the longest distance across the city, of any line of the Portland Railway Company travelling in one general direction?

A. Do you mean of the Portland Railway Company?

Q. Yes, sir.

A. I think the longest is about fifteen—a little over fifteen miles—15.4, or something like that.

Q. Across the City of Portland, or entirely within the City of Portland?

A. No, sir, that would not be entirely within the City of Portland.

Q. I want the longest line entirely within the City of Portland?

A. That would be about fourteen miles. I don't know that we ever measured that directly for practical purposes—it would be about fourteen miles.

256 Q. From what streets?

A. From Montavilla, a little over six miles run from the center of the city over the St. John line.

Q. Would that be entirely within the city?

A. Yes, sir.

Q. What is the fare on that line?

A. Five cents.

Q. Mr. Fuller, why, if you know from your experience, is it possible to carry passengers on a city line of that length?

A. It is possible simply because the city lines are operated under what we might call a flat rate, that is to say, a passenger is charged five cents for no matter what distance may be travelled. A man may get aboard the car and ride two blocks, or three blocks, for five cents, or he may ride ten miles—he may get on board and ride ten blocks and pay five cents—he may get on and ride up in the neighborhood of fourteen miles for five cents. The result would be at a five cent rate, the short riders enable the long riders to be carried the longer distance at the same rate.

Q. If you had all of the riders do that and carried every passenger through to the terminus, would it be possible to do that under a five cent fare?

A. Ordinary travelling—under ordinary travelling conditions it is impossible to get full loads both ways all the time. The traffic is usually heavier one way, and under the conditions one meets with in practice, it would be an impossibility.

Q. In your experience do you find the short riders on that line riding a short distance as in the great majority?

A. Oh, yes sir. There are very few who ride the whole length of our two longest line.

257 Q. Have you any means of calculating the average distance travelled?

A. Absolutely, no sir.

Q. Does this condition as to short riders obtain also upon the Mt. Scott line?

A. Only to a limited extent, but to some others it does, yes sir.

Q. Inside the city limits, does it?

A. To some extent it applies to all lines; there are some who get off and on and some who go clear through.

Q. Is it true to a greater or lesser extent than on the Oregon city division? Are there more short riders on the Mt. Scott line than on the Oregon City line, inside the city limits?

A. Yes sir.

Q. In about what proportion?

A. I could not tell you that. There are very few stops on the Oregon City line from the Madison Street bridge to the city limits.

Mr. GILTNER: When you speak of that, do you include the Sellwood line?

A. No, sir. I mean on the lines upon which the Oregon City cars run—the Oregon City cars run over the River division.

Mr. GRIFFITH: What, Mr. Fuller, has been your experience, if you have had any, as to the building up of suburban communities along the lines of such railways with which you have been connected?

A. My observance of the extension of roads into such communi-

ties is that the building up of such communities depends upon a great many things. Of course, the car fare, frequency of
258 service, other facilities, privileges that are offered in these different districts or locations, the character of real estate agents pushing the property, the price of the property, and a number of other things all enter into that. I remember when our Alberta Street Line was extended. (Objected to.) I have noted in some places where they had no water, they were building up very slowly, indeed, until water was introduced. Then I noted some places in which the lines had been built and service had been given for a number of years in which there appeared to be no particular activity on the part of real estate agents, and building up was very slow, and other things have retarded its building up.

Q. What was the purpose of making the commutation rate between Portland and Milwaukee and Portland and Oak Grove group of stations?

(I object to that.)

Mr. GILTNER: It don't make any difference.

COURT: Answer the question.

(Exception.)

A. I would say these rates were made before my connection with the road, but I have always understood they were made to attract settlers to the points where these commutation rates were made, and also to make a fairer charge for the service rendered for the haul than could be done under the ordinary five cent division, which is the ordinary coin of circulation, and for which our registers are made to record.

Mr. GILTNER: I move to strike that out, for the reason that he has not shown he has any thing to do with making those rates, and it is not shown he makes those rates. The rates were made by Mr. Mulchay, and he is the man who does it. They were made before he came here.

259 COURT: Objection overruled.

(Exception.)

Q. State whether or not in making the commutation rates, there is any effort made to equalize the fares between different stations on the lines of the road, so that a station next beyond to a ten cent station would still, being the first of three or four stations of another five cent group, should receive a commutation rate in accordance with its division, from the distance from the terminus.

(Same objection.)

COURT: Answer the question.

A. The commutation rates are less for a nearer point to a point where the change of fare is made than on towards the opposite end of that group.

Q. That is because you must make some division?

A. Yes, sir.

Q. Mr. Fuller, what could be the effect if the order of the com-

mission in regard to establishing rates of 10c. from Portland to Oak Grove, Center and Risley were put into effect upon rates of your through traffic to Oregon City and through traffic to other points south of Risley?

(Same objection.)
COURT: Answer the question.
(Exception.)

A. If our rate to Risley were reduced to 10c. and our rate to Oregon City was attempted to be kept the same, it would make the charge from Risley to Oregon City, which is now ten cents, fifteen cents, which, there is no doubt in my mind, would be considered a very high rate by the people living along the route.

Q. So that if your rates from Oregon City to Risley should remain unchanged and the order of the commission were to go into effect on the Oregon City traffic or the traffic south of
260 Risley?

A. I think it would practically amount to a reduction of that fare in the end.

A. And how would that work out?

A. It would mean a loss of receipts to the company.

Q. To what extent?

A. Well that would be a very difficult thing to determine exactly. I can only make an estimate. It would probably make a difference.

Q. Do you know the number of passengers carried on the Oregon City division?

A. I think through the year 1907, there was something over a million, about one million, one hundred thousand—that is my recollection of it. It is on those sheets there I think.

Q. If, Mr. Fuller, the total number of passengers on the Oregon City division, riding to points and from points south of Risley, was 856,814 in the year 1907, and taking that as the basis for the annual business, what would be the effect of a reduction of the fare according to the order of the commission?

(Objected to as it is not shown here what the travel is from Portland to Risley, and Your Honor knows it is a fundamental proposition that you cannot ask a witness a hypothetical question without anything to base that question upon.)

WITNESS: Why, the order of the commission only goes to Risley—the direct effect of the order of the commission could only go to Risley, as I stated before it would mean an ultimate reduction of our fare clear through to Oregon City.

Mr. GILTNER: My objection is noted to that because there
261 is no statement of evidence introduced.

A. On the basis of my opinion it would ultimately reduce our fare clear through. It would cause us to lose five cents a fare clear through, which would mean $40,000 or $45,000 a year.

Q. Would it be possible if this order remained in effect that a

man could get on at Oregon City, pay a ten cent cash fare to Risley and another ten cent cash fare to Portland?

A. Unless we raised the tariff from Risley to Oregon City—unless we raised that fare it would. The fare from Portland to Oregon City would be twenty cents instead of twenty-five cents, according to the tariff in effect.

Mr. GILTNER: In regard to the road bed, isn't it a fact that the road bed grows better year by year? You are working on this road bed all the time, aren't you—tamping it up and so on?

A. Our road bed is growing better, but not by charges to maintenance, but because of charges to new capital account.

Q. Regardless of charges to capital account, doesn't a road bed get better year by year?

A. A great deal of it gets worse.

Q. Where?

A. For instance, the Mt. Scott line gets in a very much worse condition at times.

Q. Do you mean where you are building upon solid ground?

A. Do you mean the track?

Q. I mean the road bed itself.

A. The road bed would get better year by year, yes sir.

Q. Isn't it a fact the maintenance account shown here in this case includes all the items and expenses necessary to keep the
262 road bed, road way, and electrical equipment in as good condition at the end as at the beginning?

A. No; wear and tear excepted.

Q. Do these excerpts show that they don't, wear and tear excepted?

A. No sir, but it is a plain case that no matter how much work you do upon it, it cannot be as good at the end of the year as it was at the beginning.

Q. Isn't it a fact that you are putting in money all the time so as to keep it in as good condition at the end of the year as at the beginning of the year?

A. We are putting in new money.

Q. And putting in new cars?

A. Yes sir.

Q. And keeping the old cars in repair all the time?

A. As well as we can.

Q. Isn't it a fact that with the new cars put in and this maintenance account, shown in these excerpts here, tend to keep that in as good repair as at the beginning of the year?

A. No sir.

Q. Isn't it a fact that it is in as good repair at the end of the year and sometimes better?

A. No, not at the end.

Q. Isn't it a fact that you are required by law to keep those accounts in that way?

A. Yes sir, but it is impossible by repairing anything to keep it as good as new.

Q. Cannot you repair the road bed and keep it better?

A. Yes sir.

Q. And can't you sometimes repair a car and keep it
263 better than in the first instance?

A. No sir.

Q. Can you do it with your electrical equipment?

A. No sir.

Q. Overhead—don't you make that better all the time?

A. No sir, I don't think I can say we do. Overhead is something we have at the end of ten years. It might be then in as good condition as it was before, because it has all been replaced with new poles and new wires.

Q. You keep this up right along, don't you?

A. Yes sir, the repairs.

Q. Do your books show any charge made to depreciation in your equipment or road bed?

A. Do you mean the Portland Railway Light & Power?

Q. Yes sir, and the whole system?

A. The O. W. P. system—not to my knowledge, I would not want to answer positively.

Q. You never did keep any record of that, did you?

A. I have had connection with some properties——

Q. I mean in the books.

A. —in which there were some charges made to depreciation on some particular points.

Q. Tell me what it was.

A. For instance, in the previous Portland Railway Company——

Q. I am talking about the O. W. P. system.

A. I told you I didn't know that—that is why I referred to the bookkeepers.

Q. Isn't it due to the fact that you don't charge anything—the reason is because you charge this expense to the expense of maintenance, which keeps that road in as good repair, if not better,
264 than before, and all the facilities connected therewith just as good as before, isn't that the reason?

A. I do not consider that the reason.

Q. Do you know why, then?

A. I can tell you the reason why I think so.

Q. I want to know why you do that. You don't keep the books do you?

A. No sir.

Q. Isn't there a depreciation against the capital?

A. There is no charge to depreciation that I know of.

Q. And the reason is you keep the road bed and the rolling stock up all the time?

A. No sir, I don't say that.

Q. I am asking you if it is not so. The fact is, you don't know—in fact, that is the reason?

A. I consider that in this way——

Q. Isn't it a fact that they don't do it and you don't know why they don't do it?

A. Well, I don't know, Mr. Giltner, as that matter ever came up to me.

Q. That matter never came up to you and you don't know anything about it?

A. I know there is none.

Q. And you don't know why they don't do it?

A. I have my ideas.

Q. I want to know what you know and the court wants to know what you know—what you know.

A. I have not had the say as to matters of depreciation.

Q. Never has been charged, has it?

A. Never in the short time this company has been in operation.

265 Q. And you have nothing whatever to do with it. Has there been anything charged to increment in value?

A. Do you mean by betterments?

Q. No, for increment in value.

A. Do you mean expense for betterments? Every day we spend new money for betterment which is charged up to the plant.

Q. Then isn't it a fact that when you charge these things up that you have a railroad of more value at the end of the year than before?

A. Why certainly, if we put a million dollars into improvements, it is worth a million dollars.

Q. Then what are you talking about depreciation?

A. If we had a million dollar's worth of new work, the property ought to be worth a million dollars when we got through.

Q. Isn't it a fact that the increase in the price of labor has been more than sufficient to off-set the decrease of depreciation of the road?

A. I don't see what that has to do with it.

Q. It costs more to build it.

A. When I came to this country eighteen years ago, it was just as high as it is now, and has been just as low—it has been lower and it has been higher both.

Q. And copper wire has gone up a great deal.

A. We bought it as high as 28 and as low as 13. We are buying it now at very much less—I think somewhere around 15 or 16 at the last quotation.

Q. Have you taken into consideration depreciation—fluctuations in value when speaking of depreciation?

A. No sir, when I speak of depreciation—I don't care, at
266 the end of a long period of time, it is not as good as it was in the first place, unless we rebuilt it.

Q. Well, suppose that the profits of the road were greater, would you consider it better—more valuable?

A. Would I consider the property more valuable?

Mr. GRIFFITH: The witness has testified as to the cost of this road. I have been absolutely fair with counsel and have brought it all out.

Mr. GILTNER: Do you make an inventory of equipment and

everything on the O. W. P. line so as to arrive at the value of that road?

A. Only rough figures—I know what equipment we had and can approximate the valuation.

Q. State to me what they are—give me some items.

A. What kind of items?

Q. I want to know how many cars you have. It want to know the number of cars.

A. I base my figures upon the approximate valuation of the road—of the character of ours per mile.

Q. Then, you don't base your calculations upon the number of cars, miles of steel rails, or the number of ties.

A. I could if I made a detailed estimate.

Q. Have you?

A. I have made a rough estimate. When I say that I mean we built extensions. I know about what they cost, about what the cost of certain extensions are, and base the calculations upon that, and the valuation of their equipment.

Q. Well, I would like to have the items then, if you have made a statement of that kind. What are the items—how many cars—how much or how many miles of rails?

267 A. Well, the miles of rails are given in the report—95.53 I think.

Q. How many tons per mile?

A. Over 40 tons to the mile—some 50, some 70, and some 84 pounds.

Q. How ma-y tons from Portland to Oregon City do you own? Do you know what the proportion of 50 lb. rails is, and what the proportion of 60 lb. is?

A. No sir, as I said before, to get the exact details of the kinds of wire and pounds of rails would require a re-survey of the entire line, which has been built sixteen years.

Q. Do you know the cost of that road?

A. No sir.

Q. Do you know what it was closed out for by Meyers and others, bond-holders?

A. I don't know now—I do not remember.

Q. Was it for less than $500,000?

A. I do not remember.

Q. Don't you know that the Steeles lost it for less than $500,000?

A. I don't remember that.

Q. You did not build the Oregon City line?

A. No sir, not that particular line.

Q. Don't know how much was given, do you, for right of way.

A. No sir.

Q. Do you know how much contribution was given toward it?

A. I don't know. I did not make an estimate of that in the valuation.

Q. Did you take that into consideration?

268 A. I did not consider the right of way as being of any special moment or special cost at all.

Q. Now, Mr. Fuller, if that road between First and Couch Street, to Oregon City—of your knowledge—what kind of road is the most expensive, or was the most expensive to build?

A. Well that would be a very difficult question to answer. We have pieces of very expensive work.

Q. You don't know where?

A. Between Yacht Siding Gravel Pit and Sellwood, near Sellwood Mill station there is a long fill—perhaps, it averages 20 feet in width, that was very expensive.

Q. What did that cost, if you know?

A. I cannot give you the exact cost—I know it was expensive to build.

Q. Do you know?

A. Nobody knows.

Q. Isn't it a fact that the railway company kept an account of the amount of money they put out for that fill and the work done?

A. I could not tell you.

Q. Isn't it a fact that the records were kept of it?

A. I don't know.

Q. Did you ever look to see?

A. I don't know that I have the books.

Q. What would the mile of road cost from Gold Links to Milwaukee—what would it cost for the mile and a fraction——

A. About a mile and one-half.

Q. That is about a straight away course between those points?

A. Yes sir. No very heavy work.

269 Q. What was the cost?

A. For what portion of the road?

Q. The road bed, laying rails and the cars?

A. In proportion to the rolling stock?

Q. I will come to that afterwards—what did that cost? No fills, along there?

A. Yes sir, there is a fill at the Italian Garden and the bridge at Milwaukee.

Q. We will leave the bridge out.

A. I should think the value of that road per mile would be about, we will say, between sixteen and eighteen or nineteen thousand.

Q. What weight of rails there?

A. Per mile of single track?

Q. What weight of rails?

A. Some 40 and some 56.

Q. Do you know what they cost?

A. No, I don't. I know what they would cost now.

Q. They are laid practically on level ground?

A. Some fills, say six or seven feet at the Italian Gardens.

Q. That would cost from fifteen to nineteen thousands?

A. Yes sir, with the overhead.

Q. The fifteen or nineteen thousand includes the overhead?

A. Yes sir.

Q. What would the bridge cost there at Milwaukee, do you know what that cost?

A. My recollection is that the new bridge cost a little something under $2,000—maybe $1,800, or something like that.

270 Q. Now what would the road bed cost from Golf Links down to the Oaks, before you reach the fill—what is the distance—about there?

A. I have given you the figures per mile.

Q. I am asking what the distance is from Gold Links to the Oaks?

A. Well, from the Oaks Station, which is not exactly the end of that fill, some six or seven hundred feet north from the Oaks Station to Golf Junction Station, is 1.15 miles.

Q. What would that cost—any fills there?

A. Yes sir, certain small fills.

Q. Don't amount to anything, do they?

A. Yes sir.

Q. What was the cost for that distance?

A. I should think that would be very much the same cost as the other.

Q. Can you tell me the ratio of the 40 lb. and 60 lb. between those two points that you know of.

A. Between the Golf Links and Oaks Station, my recollection is that it is all 56 lb. rails.

Q. Do you know what it cost per ton?

A. I don't know what was paid for it per ton, no sir.

Q. What kind of overhead wire have you—how heavy?

A. Well, my recollection is the wire is 40.

Q. What was the cost of that copper wire?

A. I could not tell you.

Q. What did the poles cost—do you remember?

A. I don't know.

Q. What did it cost to erect it?

A. I was not here when it was built—I could not tell you.

271 Q. Take from Milwaukee to Milwaukee Heights, what kinds of rails in the road bed there. From Golf Links to Milwaukee what is the ratio of 40 to 56 lb. rails, and between those two points?

A. I could not tell you exactly.

Q. Did you ever find out, or estimate it, or make an effort to find out?

A. No sir, I told you that I had made no detailed record.

Q. You never looked to find the ratio?

A. No sir.

Q. The wires and poles—you don't know anything about the cost of them?

A. I did not say that. I said I don't know what they cost.

Q. What did they cost?

A. I can only judge from other work that has been done.

Q. Isn't it a fact—how about the road now from Milwaukee to Milwaukee Heights—what kind of a road bed have they there. Is it straight away, up hill, or down hill, or what grade? Do you know any thing about that?

A. Yes sir.

Q. What?
A. I know it is not straight away.
Q. How about the grade?
A. Very heavy getting up the Milwaukee Heights hill.
Q. What did the road bed cost there. Do you know what weight of rails?
A. Part 56 and part 70.
Q. Do you know the ratio?
A. 56 to Island Station, or near there, and from there on to the switch—passing point—it is 70. In that switch there are some 40.

Q. What is the distance from Milwaukee heights to this
272 point I am speaking of?

A. From Milwaukee to Milwaukee Heights, according to the schedule, is within .01 of being just a mile.
Q. What did that cost, if you know?
A. I don't know what it cost per mile. I can give you my judgment.
Q. What is your judgment?
A. My judgment is that it cost seventeen or eighteen thousand per mile.
Q. That is only based upon a superficial estimate—wasn't it? It was not based upon any detailed estimate of the cost?
A. That was based upon the estimate of what similar roads have cost.
Q. Take from there on to Oak Grove, how about that—what kind of rails used in that road bed?
A. They are now part 70 and part 40.
Q. Do you know the ratio between them?
A. Not exactly.
Q. Do you know any where near the ratio? What is the distance from Milwaukee Heights to Oak Grove?
A. About .78 of a mile.
Q. What would that cost per mile?
A. Speaking of the road bed?
Q. Everything—road bed, overhead, trolley, and rails.
A. I should say about 17,000. It is a little lighter work than the other.
Q. How would it compare with between Golf Links and Milwaukee?
A. Very much the same.
Q. That was when you gave that estimate from fifteen to nineteen thousand?

273 A. Yes sir, but this is a little closer.

Q. Take from Oak Grove to Risley, what is the difference?
A. That appears to be just the same as the other—.78 of a mile.
Q. What is the cost of that, including everything—of that part? Do you know the number of rails?
A. No I never counted the rails.
Q. Do you know the weight of the rails?
A. There is a little 40 and mostly 70.
A. That is 40 lb.?
A. Some 40 lb.

Q. What did that cost?
A. As I have told you, I cannot tell you what it cost.
Q. What did the rails cost?
A. I cannot tell you.
Q. What did the poles cost?
A. I cannot tell you.
Q. What did the 40 lb. of rails cost?
A. I don't know what they cost.
Q. Then, you don't know about that?
A. I know the value.
Q. Did you ever make a detailed estimate of the cost of the road between Risley and Golf Links?
A. No sir.
Q. Between Golf Links and the Oaks?
A. No sir.
Q. From the Oaks to Madison Street Bridge on the East Side?
A. No sir.
Q. You don't know what they cost?
A. No, I have told you they were built before my time on the road.

274 Q. Now, from Risley to Oregon City is a distance of what?
A. About 5.25 miles.
Q. You know what kind of rails there?
A. There are different rails in different stretches.
Q. Give me the weight and number and the length of the stretch.
A. 70 and 40.
Q. How many 70?
A. Between Risley and Oregon City?
Q. Yes sir, and how many 40's if you know?
A. I don't exactly—quite a large number.
Q. Do you know what the wire cost—do you use the same wire all along there?
A. No sir. I think the wire is single naught.
Q. Do you know what that cost?
A. No sir.
Q. Know what the poles cost?
A. No sir.
Q. Do you know what it cost to install?
A. No sir.
Q. What do you say that line could be built for per mile?
A. From Risley to Oregon City—that is very heavy work in there and has a long Clackamas fill. There is a Clackamas bridge.
Q. What did that cost?
A. That is of recent construction, and cost about $32,000 or $33,000 for the new work.
Q. What do you say?
A. I was just trying to make an estimate—you are taking odd stretches. I should think that road bed in there with overhead would cost from thirty-four to thirty-five thousand per mile.
Q. That is merely a guess?

275 A. No sir, that is an estimate.
Q. Where did you ever build a road like that?

A. We have made the fill across the Golf Links bottom, across the Oaks bottom, which is similar in depth of fill. We built that last year.

Q. You testified you did not know what that cost?

A. Know what cost?

Q. I did not mean that, do you know the cost?

A. I don't know exactly what it cost.

Q. Where did you ever build a road like this road?

A. You cannot build a road just like this any where.

Q. What suburban road did you ever build outside of this Cazadero line.

A. I did not built the Cazadero line.

Q. Where did you ever build one?

A. We made that fill up by the Oaks from the Yacht Siding to the Sellwood mill.

Q. You said you didn't know what it cost.

A. I know what a portion of it cost.

Q. Do you know what it all cost?

A. Not with the two tracks—I don't know what it cost, no sir.

Q. Where else did you ever build outside of Portland?

A. We have built a great many extensions.

Q. Isn't it a fact that almost all of your road building experience has been confined to the City of Portland?

A. The major part of it, yes sir.

Q. Where were you before you came in and became connected with the company in the City of Portland?

A. Originally in Louisiana with the Wisconsin Central.

Q. Did you build that?

A. I was resident engineer in full charge of construction.

276 Q. Was it an electric road?

A. There is no difference between building an electric road bed and a steam road bed.

Q. Yes sir, but your electric line, the construction isn't as heavy as it would need to be for a big locomotive.

A. A yard cost the same any way.

Q. It costs more to put in more yards though. Isn't it a fact that you have to build wider fills with the steam road than with the others?

A. A very great many use the same.

Q. Then do you know what it cost you back there?

A. That has been too long ago—I have forgotten.

Q. Then, isn't it a fact that you have forgotten about that as to what it cost back there, and you don't know here in the City of Portland, since you have been here, in regard to that fill near the Oaks, that the statement you have made here in regard to the cost of this O. W. P. road is a guess, and not founded on facts or detailed facts, or any thing else?

A. I would not admit that for a minute. It is not a guess, it is an estimate. I said I did not build this road, and I do not remember twenty years ago back there.

Q. Do you know the number of people, or the amount of travel, from Risley to Oregon City?

A. I don't know.

Q. Do you know whether one or ten travel there a day?

A. You mean people who board the cars between those two places?

Q. No, those that get on at Risley and go to Oregon City?

A. I could not say as to that.

Q. Or from Courtney to Oregon City?

277 A. No sir, the exact numbers I don't know.

Q. Do you know approximately?

A. No sir.

Q. You said it would cost you five cents on every fare that went from Risley to Oregon City?

A. Yes sir.

Q. How about those people that went to the Chautauqua—to Gladstone—did you lose five cents on those people?

A. That would depend upon the rate—that only comes in for a few days in the summer.

Q. How about the travel from Gladstone to Oregon City?

A. There is a little travel on it.

Q. How much?

A. It is rung up on the five cent register.

Q. That is only during the Chautauqua season?

A. It is rung with the five cent fares.

Q. Then if this five cent fare was given to Milwaukee and the ten cents to Oak Grove, you are not in a position to figure what the loss would be to the company, are you?

A. No, not exactly, but I could make a rough estimate.

Q. Can you figure it out—have you ever figured it out?

A. I have figured it out in my head about what would be the cost. As I say it would be an indefinite guess. I don't know just how many five cent and ten cent fares there are.

Q. Isn't it a fact that a great many people who travel from Portland to Milwaukee pay a five cent cash fare to Golf Links and then pay another five cent cash fare in, in order to get a transfer in the city?

A. I could not answer that.

Q. Isn't it a fact that the number of five cent and ten cent fares isn't credited here?

278 I have not seem any estimate.

Q. The number of five and ten cent charges?

A. I don't remember there being anything about the five cent charges.

Q. The people travelling from Portland to Milwaukee pay five cents to Golf Links and five cents from the Golf Links to Milwaukee—you could not tell that because the conductor rung a ten cent fare as two fives?

A. Yes sir, but the ten cent fares include all ten cent fares on the division.

Q. But I am simply speaking of Milwaukee.

A. I understand.

Q. Now, we will take from Oak Grove and those places who

pay to Golf Links and then pay a cash fare in order to transfer in the city. You could not keep any record of that?

A. No sir.

Q. Did you testify before the Railroad Commission?

A. The present railroad commission?

Q. Yes sir.

A. In this same case?

Q. Yes sir.

A. I believe I did.

Q. Now, how does the railroad between Mt. Scott and the City of Portland compare for being a straight away course with the road bed from Portland to Milwaukee?

A. That is rather an idefinite question—how would it compare as to a straight away road bed?

Q. Yes sir, or curve.

A. Do you mean that in a general direction, or the amount of curvature?

Q. Yes sir.

A. The only way to get that would be to get the alignment
279 and figure it out.

Q. Isn't it a fact that the Mt. Scott line has more curved road than the Milwaukee?

A. More turns—more curves? No, I should say from my recollection the Milwaukee line had more curves, or curvature. It is all straight by the River road, the route taken by the Oregon City cars. I think it is considerable more than the other.

Q. Which cost the most that or the Mt. Scott?

A. There is no question but that the Oregon City line cost much the most.

Q. It did?

A. Yes sir.

Q. Do you know that?

A. I would like to correct that statement and say that it is worth the most—has the most value.

Q. How many cars run on the Oregon City line?

A. Regularly?

Q. Yes sir.

A. Our regular schedule takes four cars—four trains.

Q. What is the cost of those cars. I don't want any guess, I want to know what you know—did you purchase them?

A. No sir.

Q. Do you know what was paid for them?

A. No sir.

Q. Did you ever purchase any?

A. We have.

Q. Coaches or cars like those?

A. Built the same like those.

Q. Do you know what they cost?

A. I know in round numbers.

280 Q. Tell what they would cost?

A. Between six and ten thousand. In the regular service

in the summer I think we run as high or as many as sixteen cars on the road.

Q. And cost how much per car?

A. I haven't the cost of the trailers quite as close as the others—they would probably cost just about half—probably between $3,000 and $3,600 per car, I should think.

Mr. CRAWFORD: You are acquainted then with the railroad—the way it was constructed between Golf Junction and Nickum, are you not?

A. Golf Junction and Nickum, yes sir.

Q. Then you are acquainted with the road and the way it is constructed between Golf Junction and Milwaukee, are you not?

A. Golf Junction and Milwaukee?

Q. Yes sir.

A. Yes sir.

Q. It kind of branches out, and one runs to Golf Junction and the other to Milwaukee?

A. Yes sir.

Q. The Milwaukee Road between those points is just about 150 feet farther?

A. I could not tell you without looking it up.

Q. It is just about that?

A. 1.35 miles to Milwaukee and 1.13 to Nickum.

Q. Would it cost any more to build from Golf Junction to Nickum than from Golf Junction to Milwaukee?

A. I should consider it cost slightly more from Golf Junction to Nickum than from Golf Junction to Milwaukee.

Q. Cost probably $3,000 more?

A. No, sir, I think not.

Q. There is a big fill and a big cut?

A. Yes sir.

281 Q. Could you give an estimate in the difference in cost of that little stretch that I mentioned?

A. Being some such large fills, of course, it is difficult to place an accurate figure, but I should think that division in there would amount to something like thirty—perhaps, between thirty and forty thousand per mile. There is a difference in the class of work.

Q. Between those points I mean?

A. Nickum has a heavier fill in there which would make it cost more, perhaps.

Q. The fare from Nickum to Portland is five cents with a transfer, isn't it?

A. Yes sir to persons boarding a car at Nickum.

Q. To persons boarding a car at Milwaukee, it is ten cents without any transfer, isn't it?

A. Yes sir.

Q. You were speaking of the effect of reducing fares on railroads. Now, Mr. Fuller, suppose the fare from New York to Portland is $60, if that should be reduced to $50 what do you think

the result would be—would the passenger travel be stimulated or would it be decreased?

A. I think there is no question but what the traffic would be increased, if they had the equipment to carry it.

Q. Very materially stimulated?

A. I think so.

Q. It is very usual isn't it whenever they have any reduction of railroad fare that the travel is increased?

A. The same as reduced prices in any other line of business.

Q. Isn't it necessary in determining whether there is loss or gain to take that increased travel into consideration?

282 A. It is necessary not only that we should have to take that increased travel into consideration, but we should also have to take into consideration the cost of carrying the people.

Q. Put it on this principle, that it costs to carry a passenger from New York to Portland $40, and they are actually getting $60, if they were to reduce that fare to $50, and three passengers rode where one formerly rode, they would make $30 where they made $20 before?

A. Why no, I don't think that would follow. True, if they are going to carry three passengers, but their operating expense would have to be considered. If the trains were running empty that would be true.

Q. But they are not running trains that way.

A. When you are getting three times as much business as you did before you would have to put on three times as many cars.

Q. I placed that fairly on the basis that it actually cost $40 per passenger. That would include all transportation—everything.

A. Yes sir, if they could increase their traffic three times and still keep the cost down to the same ratio, they would make more money.

Q. In your stating that the company would lose $40,000 because it cut off five cents on each passenger, you figured nothing at all for increased travel—you did not take that into consideration?

A. No. sir.

Q. Now, then, if it should prove that the increased travel there would more than off-set that five cents over and above the cost of carrying the increased travel, you would not lose anything?

283 A. No. sir, if we carried enough more to make up the loss, we would not lose anything.

Q. This 800,000 fares and some odd, to which you referred, and you cut off five cents on each one, that included a whole lot of nickel fares which you did not cut?

A. That was a hypothetical question.

Q. Wasn't that figures on the basis of cash fares—all of it when you got 800,000?

A. That question was that of the 800,000 people where carried from or to certain points, we would lose five cents apiece.

Q. He took that statement here and put in the number of fares

from it, and asked you whether five cents went off each passenger, and you claimed that it did. Now, as a matter of fact, it doesn't, does it?

A. It seems to me it applies to all passengers except the local rides between Gladstone, and those other points between, and Oregon City, which I know are very few—there are some in there, of course.

Q. It would be impossible for it to take in fares except those fares that were figures on the ten cent and fifteen cent and twenty-five cent basis along there, and not effect any others—could it?

A. It could affect the ten cent, fifteen cent, twenty cent, and twenty-five cent.

Q. How could it affect any thing except from Milwaukee and Oak Grove to Portland on that division?

A. As I stated before, if the present rate holds and the new order goes into effect, a party can buy a ticket from Oregon City to Risley for ten cents; they can buy a ticket from Risley to Portland for ten cents, which means that on the Oregon City traffic,
284 the main through traffic, the fare would be reduced five cents.

Mr. GILTNER: That is on through rates?

A. That is Oregon City to Portland. What do you mean by through rates?

Q. From Oregon City to Portland.

A. Yes sir, the sum of the locals would be less than the through rate.

Q. Don't they ride from Oregon City to Portland for seventeen cents on commutation tickets?

A. Yes sir, they do.

Q. The order doesn't affect commutation tickets?

A. No, I understand not.

Q. And there is more than three-fifths of your traffic isn't there on commutation tickets?

A. I could not tell you without looking at the figures—it is impossible for a man to carry those figures in his head.

Q. Your total figures as reported and put in evidence before are 1,174,421 and your tickets are 491,852. Your cash fares are 682,569. Now, then, the cash fares include nickle fares, doesn't it, and also ten and fifteen cent fares which are paid in cash and could not be affected by this order?

A. May I see that sheet please? I can judge a little better from that. (Examines it.)

WITNESS: As I understand the statement, the cash means all the cash taken in on the line, that is, the number of passengers paying cash.

Mr. CRAWFORD: And the large proportion of that which travels to the Golf Links, to Oak Grove, and those places in there, to
285 Portland for five cents, they don't count in this estimate? The order could not affect those paying a nickle fare?

A. To the Golf Links?

Q. Any nickle fare.

A. No sir; as I understand it, it is the number of passengers paying cash, irrespective of what is paid.

Q. Then in your estimate of the loss which you figure on an estimated number, it would not include nickle fares?

A. No sir. The only fares affected are those who ride between Risley and Oregon City and the five cent fare would remain the same.

Q. The five cent fare would not be affected any where?

A. No sir.

Q. The commutation tickets are not affected there are they?

A. No sir, they are not affected.

Q. Now, then, that would take out about three-fifths out of your 800,000, or a little more, wouldn't it?

A. I have no means to tell. I don't know how many of these tickets are commutation tickets or round-trip excursion tickets.

Q. We can figure that up ourselves.

A. As I understand it, the tickets here refer to all tickets.

Mr. GILTNER: You have the commutation tickets figures, haven't you?

A. It says tickets—I presume that includes all.

Mr. CRAWFORD: Will you please tell us how many commutation tickets were issued in 1907, and how many cash fares?

A. I could not tell you.

Mr. AITCHISON: You have exhibit No. 10 in hand?

286 A. Yes sir.

Q. The total number of tickets from Milwaukee to Portland for the year 1907, reduced to a one-way ride basis, was what?

A. From Milwaukee for the year 1907, 127,453.

Q. Now, the direct effect of this order would be to cut five cents off each one of those tickets, wouldn't it?

A. No, I did not suppose this order affected those tickets at all.

Q. Two cents, I should say, because those people who have tickets will pay cash fare, and those people will be reducing your revenue two cents on the basis of cash performance—that is what it would mean?

A. 2500 per year.

Q. Take the ten cent fares from Milwaukee.

A. 60,005. Those are not all to Milwaukee; they are for the whole line.

Q. That amounts to 3,000?

A. Yes sir.

Q. Take the tickets under the fifteen cent group—they are not affected at all are they?

A. I think our highest ticket rate in there is ten cents. If that is the case, it would not be affected.

Q. Take your fifteen cent cash fares, 46,155, they would be affected five cents each?

A. Allowing all between those points?

Q. Yes sir, that amounts in all to how much?

A. 2,300.

Q. The total aggregates how much?

A. $7,800.

Q. Now, that is a direct loss this order will cause, isn't it?

287 A. Yes sir.

Q. Per annum?

A. Yes sir.

Q. That is, assuming that travel will be the same as in the past?

A. Yes sir.

Q. Now, if your travel increases, of course, there would be a greater margin of profit?

A. We would be carrying them to Milwaukee for less than one cent a mile. I don't believe there would be any margin in that at all. I believe the bigger business we got there, the worse off we would be.

Q. Now, out of about one mile and a half, we have accounted for about one-fourth.

A. We have accounted for about 300,000.

Q. Now out of the remaining two-thirds or three-fourths, the large amount will not be affected at all by the order?

A. In my judgment it would.

Q. But a large amount would not?

A. All Oregon City business, I understand, will be affected.

Q. You mean the Portland-Oregon City business?

A. Yes sir.

Q. Now, a large part of your Oregon City business would not be affected by it?

A. Those buying commutation tickets.

Q. How in the wide world upon the travel between Gladstone and Oregon City, and Canemah and Oregon City, could that be affected?

A. I don't know how much it is.

Q. Whatever it is, it is not affected?

A. No sir, it could not be affected. Short riders between Risley and Canemah getting on and off there between those points could not.

288 Q. In your estimate for Mr. Griffith on direct examination, placing the loss at $40,000, you were taking into consideration these 300,000 passengers, weren't you?

A. I don't know how he got his 800,000. He gave me those figures as a hypothetical question.

Mr. AITCHISON: But you don't have any figures you can give us or to the court to show the number of passengers, who go to Oregon City to Portland, who would be directly affected by this order?

A. I have none here.

Mr. GILTNER: Which costs the most, to carry a car full of passengers, or one-half full, or one with no passengers at all?

A. No sir, a little more to carry passengers.

Q. Costs more to carry passengers than if you don't carry any passengers at all?

A. Yes sir.

Q. Then the increased travel would give a greater profit?

A. It would, if we were carrying cars empty. I would like to make an explanation, that in my figures of the cost of the road, where I figures the cost of the road bed and trolley, I did not take into consideration the feeder wires and extra wires. I mean upon these sections I have been asked questions upon.

Q. And in answering Mr. Giltner as to the cost of the road and rebuilding, you did not consider the cost of equipment at all?

A. No sir.

Q. In order to operate the Oregon City division, approximately how many more cars are required?

A. We are operating with practically four cars,—we ought to have eight.

Q. Do you maintain a reserve?

289 A. Yes sir, we try to, but we cannot always to it.

Q. How long have you been with them?

A. Since May 18, 1896.

Q. And the road was practically completed before you took charge of it.

A. We have built the Troutdale division and extensions for a number of miles.

Q. They were built under your direction?

A. Yes sir.

Q. In your estimate of the cost of reproducing the road you did not put in the cost *od* double tracking?

A. I gave all my figures on a single track basis.

Q. When the Clackamas bridge was renewed, was any charge made to maintenance of way for renewal on the cost of that bridge?

A. I think the only charge when the bridge was rebuilt was for putting four or five, or three or four timbers in the South end of the bridge.

Q. You were asked on cross examination, Mr. Fuller, if you could tell how many passengers paid fare to Golf Junction and then paid five cent- fare to Portland to get a transfer. I will ask you if it is not a fact that if one did that, they would pay ten cents, and that that ten cents would be included in the statement in evidence? Isn't it a fact that it would appear?

A. Yes sir.

Mr. AITCHISON: Your conductors sometimes will collect fifteen cents at Portland for passage out to Oak Grove and ring up three five cent fares instead of fifteen cent-?

A. My understanding is, they don't. I never heard of its being done.

Q. If that were done, it would show and Oak Grove would not get credit for it?

290 A. Yes sir.

Q. And the same to Oak Grove through Milwaukee?

A. Yes sir, it would be the same as the ten cent.

Q. Passengers would not be likely to complain about that?

A. Some inspector might.

(Witness excused.)

At the hour of 5:30 P. M. adjournment was taken until 9 o'clock in the forenoon of the 24th day of March, 1908.

291 Pursuant to adjournment at 5:30 o'clock in the afternoon yesterday, Court was convened at 9:00 o'clock in the forenoon on the 24th day of March, 1908.

Present: same as yesterday, Mr. F. I. Fuller still being on the stand.

Mr. CRAWFORD: What is the seating capacity of your cars on the Oregon City line?

A. Our largest cars seat 56 passengers, I think.

Q. How many men does it require to operate the cars?

A. 2 men.

Q. At what compensation?

A. It varies from 24¢ to 30¢ an hour.

Q. How many hours do they work?

A. The runs vary. I could not tell you exactly but it varies from 10 to 11 hours possibly. Some of them more than that.

Q. Which men are paid 30¢?

A. That depends upon the length of time they are in the service. On the old runs the large number of men get 30¢ an hour on the Oregon City run.

Q. How many cars run daily each way not counting the Sellwood line between Portland and Milwaukee?

A. Do you mean how many trips?

Q. How many trips and how many cars on a trip?

A. I could not give you the exact number of trips without consulting the schedule, but it would be in the neighborhood of 34 trips I should think.

Q. Is that round trips?

A. Be 34 each way; they run every half hour.

Q. 34 each way?

A. Close to that.

Q. Are more than one car run at a time on any of those trips?

A. Yes, sir; I think at 5:30 going out at night and I am not sure about those coming in in the morning. That matter is left to the Superintendent.

292 Q. About how many trips for the extra cars?

A. Outside of holidays and Sundays I would not want to say how many there are at the present time. I could not say exactly. There may be two or three trips out in the morning and at night.

Q. Holidays and Sundays all have extra cars?

A. Not unless they have good weather.

Q. And if they have good weather?

A. If the weather were good there would be all the way from one to three trailers per car on Sunday.

Q. About how many trips run on the Sellwood line from Milwaukee to Portland?

A. That would be in the neighborhood of 70 trips each way. I have not the schedule.

Q. Are there trailers on any of these trips?

A. Yes sir.

WITNESS: I will take that back. There are extra cars there—

what we call trippers put in that run as far as the Golf Links when necessary.

Q. About how many are there of those?

A. My recollection is that there are four extra cars go out each night as trippers.

Q. And in the morning the same?

A. Yes, sir; about that—three or four.

Q. What is the object of running trailers or extra cars?

A. The object is to carry the people—to carry the passengers.

Q. What makes the necessity for it?

A. The people who travel on the line.

Q. I am speaking of the run between Sellwood and Portland, of course.

A. Anywhere it is the same thing.

Q. That is because your regular service cannot accommo-
293 date the travel is it?

A. Yes sir.

Q. Because so many people travel?

A. Yes, sir; to carry the people.

Q. Now you may state whether the Oregon City line is double track between Portland and Milwaukee?

A. Do you mean by that what we call our River Road is double tracked?

Q. Yes, sir?

A. It is double tracked the largest part of the way.

Q. Between Portland and Milwaukee?

A. The largest part of the way.

Q. Is the Sellwood line double tracked also?

A. The Sellwood line is double tracked the largest part of the way.

Q. You built a half mile of branch road, didn't you, to go to Gladstone, a branch spur about half a mile?

A. Yes, sir.

Q. That is only used about three weeks out of the year, isn't it?

A. For a very short time; yes, sir; perhaps two or three weeks.

Q. You did that for the purpose of accommodating that trade to the Cha-tauqua meetings?

A. It was built partially for that I think. That was built partly for that and partly for educational reasons.

Q. Are there any other branches which are only used part of the time?

A. Outside of side tracks I do not remember any now.

Q. Take such branches which are only used a part of the time and side tracks, were they all included in your estimate of 95 miles?

A. Our 95 miles is a total mileage on a single track basis.

Q. Takes everything—spurs and everything else all figures in?

A. Yes, sir; all figured in on a single track basis.

294 Q. About how long is your road—how many miles of track have you not figuring double track nor spurs and branches not used frequently nor side tracks and switches?

A. I could not give you that exactly but I think to the best of my recollection it is somewhere between 70 and 75 miles.

Mr. GILTNER: It is 71 miles.

Mr. AITCHISON: That is in the report.

Mr. CRAWFORD: There has been no substantial change in mileage since June 30, last has there?

A. I do not remember whether the Troutdale line was in at that time or not.

Q. What line?

A. The Troutdale Line. I think it was though; I think it must have been included at that time.

Q. Then assuming that the Troutdale line is in the report (Annual report to the R. R. Com.) there has been nothing else, has there?

A. I do not remember anything excepting miscellaneous side tracks and small expenditures of that kind.

Q. I understood I think, but I will ask the question again, you to say that in the mornings and evenings the seating capacity of the cars were not only filled but all standing room was taken nearly and that necessitates the extra cars?

A. On certain trips; yes sir.

Q. I think it was you but I am not certain testified that quite a large proportion of the travel on the Lents line and on the Oregon City line arose in Portland. Now, I do not know whether I had that explained or not, but I want to ask you is it is not a fact that when you say "arose in Portland" you mean men working in Portland and living outside coming to Portland in the morning and returning in the evening?

295 A. I do not remember of having exactly that question put to me but it is a question that had been asked as to the travel that arose in Portland and I would not consider it all city business; it is people who get on and off and not people who go to the end of the line.

Q. The majority of the Lents travel is outside the city, isn't it, and from outside in?

A. You mean by the Lents travel the travel on the Mount Scott line?

Q. I do.

A. My judgment would be that the majority of it is outside.

Mr. GRIFFITH: The crowding of the cars to which the General referred is that crowding incident to travel of passengers going to and from their work in the morning and evening?

A. Yes, sir.

Q. Isn't it a fact that the spur into Gladstone Park was built by this company or its predecessors as an accommodation to the Cha-tauqua Association?

A. Well, the arrangement that produced or resulted in the building of that line I was not familiar with. The directions came to build it and I always considered it was to help along the Cha-tauqua Association.

Q. What is the Cha-tauqua Association?

A. I think it is an association formed by a number of stockholders for the purpose of carrying on some educational work in the line of lectures and classes during certain seasons in the Summer

and to provide an outing and general educational work for the community as I understand it.

Q. And it meets regularly at Gladstone Park?

A. It met there regularly for a number of years. It met last year on what was supposed to be another series of annual ses-
296 sions. Of course, the Cha-tauqua Association is known all over this country.

(Witness excused.)

OSWALD WEST recalled.

Mr. GRIFFITH: For convenience I will head this statement "Passengers on all divisions" so that I can refer to it. It is not headed at all now.

Q. I now hand you a statement bearing caption "Passengers on all divisions" and ask you if you recognize it?

A. I do.

Q. What is this statement, Mr. West?

A. It is a statement of passengers carried on all divisions of the O. W. P. made up by Mr. Aitchison and myself from the records of the company. I will state that there is one sheet missing there of the Mount Scott. He has that marked "Passengers on all divisions."

Mr. GRIFFITH: The sheet missing is P. R. L. & P. Co. Exhibit 12?

A. Yes sir; that is the one.

Q. You say this statement was prepared by Mr. Aitchison and yourself from the records of the company?

A. Yes sir.

Q. And you know the totals and figures therein named are correct?

A. Yes sir; we made them up from the original sheets and checked them with the totals furnished as shown by the records of the company—as shown by the books of the company.

Q. I notice also that it is a summary of fares collected by all lines. Did you prepare that statement also?

A. Yes sir.

Q. In conjunction with Mr. Aitchison?

A. Yes sir.

Q. Is it correct?

A. We prepared the summary by lines and then checked it against monthly summary as shown on the books of the company.

297 Q. Page 3 of this statement?

A. Yes sir.

Q. And you prepared that page 3 also, did you?

A. Yes sir.

Q. Did you also prepare a statement of traffic density at the end of page 2?

A. Yes sir; Mr. Aitchison and I looked that up.

Q. Made these figures yourselves?

A. Yes sir.

Q. They are correct, are they?

A. I think they are.

Mr. GRIFFITH: We offer that statement in evidence and ask that it be received in evidence and marked (P. R. L. & P. Co. Exhibit 17).

Mr. GILTNER: We object to the acceptance of this in evidence on the grounds of being incompetent, immaterial and irrelevant and that it was not agreed upon that it was to be prepared; it was prepared by the commissioners for their own convenience and comparison and it is not the best evidence.

COURT: Let it be filed.

(Exception.)

Mr. GRIFFITH: What is meant by the table of traffic density, Mr. West, on page 2 of this statement?

Q. The Oregon City line is 15.47 miles long. The total number of passengers carried on that line during the year is 1,174,421, or 75916 passengers per mile of road. We simply reduced that in order that we might compare it with other traffic.

Q. This traffic density per mile of road was made up in the same manner, was it?

A. Yes sir.

Q. Have you prepared a statement of the traffic density on that portion of the Oregon City line between 1st & Alder streets and the town of Milwaukee?

A. I attempted to figure that out as well as I could but it does not seem to me that can be figured with any certainty. I have
298 the figures and will tell you why I think it would hardly be fair: There is a ten cent group and a fifteen cent group and to figure the density of traffic what mileage would you take?

Q. It is in evidence that it is 6.71 miles from 1st & Alder sts. in the city of Portland to Milwaukee.

A. But you would have the traffic from all ten cent stations. Another reason why it would hardly be fair, suppose a passenger should pay his fare from Portland to Golf Links and then pay another five cent fare, it would show up on the records of the company as two five cent fares.

Q. The ten cent fares shown upon the statement of ten cent fares and the 15 cent fares shown upon the statement of 15 cent fares include all 10 cent fares and all 15 cent fares collected between all stations on the Oregon City line, do they not?

A. Yes sir.

Q. Not only the 10 cent fares to Milwaukee and from Milwaukee but all 10 cent fares anywhere on the Oregon City line?

A. Yes sir.

Q. So that statement of 10 cent fares includes more than the 10 cent fares actually paid between Milwaukee and Portland?

A. It includes fares not paid between Milwaukee and Portland but there may be other fares which have been split up and do not appear.

Q. Assuming that all the 10 cent cash fares shown on the statement in evidence were actually Milwaukee fares and adding that to

the total number of tickets sold to Milwaukee, what would then be the traffic density on the Oregon City line between Portland and Milwaukee?

(Objected to as a hypothetical question not based upon real evidence.)
(Overruled.)
(Exception taken.)

299 A. Assuming that those were all ten cent fares collected and reported collected from Milwaukee to Portland and adding that to the tickets sold to that point, and taking the mileage of 6.71 the traffic density would be 27937 passengers per mile of road; and to Oak Grove it would be 14055, assuming of course, that all 15 cent fares were Oak Grove fares, the mileage is 9.26.

Q. By "Oak Grove" you mean that group of stations to which the — complies 15 cent rates?

A. Yes sir. I will state further that the average distance to those stations in that 10 cent group is 6.48 miles and would increase the traffic density to 28956. It would average that; it is a slight increase and the average distance to Oak Grove or 15 cent group is 8.48 and that would increase the traffic density to 15342—a slight increase.

Q. And in the same manner in which you have computed the traffic density per mile Portland to Milwaukee during the year 1907 I would ask you to take from P. R. L. & P. Co. Ex. 10 the traffic density to Milwaukee during the year 1907 and compute the traffic density per mile of road.

(Same objection.)
(Overruled.)
(Exception.)

A. The traffic density would be 1436 for the month of December 1907—passengers carried per mile of road.

Q. That is on the road to Milwaukee?

A. Yes sir.

Mr. AITCHISON: That is for Milwaukee passengers?

A. Assuming that those 10 cent fares collected are all collected from Milwaukee traffic.

Mr. GRIFFITH: That computation also includes the tickets sold?

A. Yes sir; to Milwaukee.

Q. I now hand you a statement bearing caption Maintenance of Way and several sub-heads and ask you to identify that?

300 A. Yes sir.

Q. What is that statement?

A. That is a statement showing the sub accounts making up the accounts of Maintenance of Way, Maintenance of Equipment, Cost of Conducting Transportation and General Expense.

Q. Of what?

A. The Portland Railway Light and Power Company—the Oregon Water Power.

Q. System of railroads?

A. Yes sir.

Q. By whom was that statement made up, Mr. West?

A. It was made up by myself with the assistance of one of the bookkeepers in the office, a Mr. Johnson.

Q. Did Mr. Aitchison assist in the preparation of that statement?

A. Mr. Aitchison was not there when that was made up.

Q. State whether or not the books of the company were open to you at the time you compiled that statement?

A. They were, yes sir.

Q. Does that statement represent charges for the various items shown in the headings and subheadings only of the O. W. P. system of railways?

A. Yes sir.

Q. You are satisfied that is a correct statement of the charges as shown by the books of the company themselves?

A. I am; it is correct as far as I know.

Q. We ask that it be admitted in evidence, and marked (P. R. L. & P. Co. Exhibit 18).

(Same objection.)

(Overruled.)

(Exception noted and allowed.)

Mr. AITCHISON: In ascertaining the traffic density the customary method is to take the total number of passenger traffic the customary method is to take the total number of passenger miles, that
301 is, the number of single miles people travel and divide by the number of miles, isn't it?

A. Yes sir.

Q. Was that done in this case?

A. I do not think they are able to show by their books the number of passengers carried or how far they travelled.

Q. The item of number of passenger miles per passenger was totally absent?

A. Yes sir.

Q. So in preparing the statement of traffic density introduced in evidence that should be multiplied by the average number of miles travelled by each passenger if that could be found?

A. Yes sir.

Q. Assuming that should be 7, then all these figures should be multiplied by 7 and that represents the average number of passengers carried one mile for each mile of road for each one of these lines. Isn't that correct?

A. Yes sir.

Q. Now in giving the figures for density of traffic to Milwaukee a few moments ago you assumed the number of passengers and assumed the length of haul. State whether or not from the books of the company you could ascertain the number of passengers carried from Milwaukee to Portland or the average length of haul?

A. No sir; I could not.

Q. Then what value could be given to the statement as you have testified to it?

A. It is merely an estimate; just a guess.

Q. Your testimony was to the effect that, assuming all of the 10

cent fares were to Milwaukee and adding the tickets the Milwaukee density was 28956 and to the group of Oak Grove would be 15342, that aggregates 44298. What relationship does that bear to the traffic density of the whole Oregon City line as you ascertained it?

A. The Oregon City line as we figured it was 75916 as against 15342 for the 15 cent group and 28956 for the ten cent group.

302 Q. That means, doesn't it, that about 60% of the total passengers carried on the Oregon City line were north from and including the Oak Grove group?

A. About that.

Q. Now, in ascertaining the traffic density between Milwaukee and Portland or between Oak Grove and Portland——

Mr. WEST: Just a minute. You say north of the Oak Grove group. How about those that might pay or who might ride from Golf Links and pay a five cent fare?

Mr. AITCHISON: Wait a minute. I will come to that. In ascertaining the traffic density over a specific portion of the road you should take into consideration not only the local travel but also the through travel and the travel intermediate to the termini you have mentioned?

A. Yes sir.

Q. So, in ascertaining the traffic density from Milwaukee to Portland you should take into consideration the travel to Oregon City over the same line and the traffic over specific portions such as the Golf Links?

A. Yes sir.

Q. Now have you done that in making your estimate of 44,298?

A. No, we just took the total.

Q. So then the through travel and the intermediate travel was not considered when you made your estimate of 44,298?

A. They would in a way, because that represents the number of fares collected. If they collected two fares between those points they would both be registered or reported.

Q. It does not consider the man who gets on at Oregon City and pays 25 cents to ride to Portland, does it?

A. No sir.

Q. Yet he travels over that line and is a part of the traffic density?

A. Yes sir; that is right.

Q. And it does not consider the man who gets on at Golf Links and rides to Portland and pays 5 cents?

A. No sir.

Mr. WEST: It is based on 10 and 15 cent fares.

303 Q. What would the effect be to include those passengers; would it be to increase the percentage?

A. It would increase the traffic density to Milwaukee.

Q. Then your traffic density to Milwaukee would naturally be upwards of 60% of the total of the whole line?

A. Yes sir; that is, if you should figure all those people who pass through Milwaukee to all those points. Then here is another thing, Mr. Aitchison, suppose a man pays 20 cents from Oregon City to Golf Links and 5 cents in. That would get it in twice.

Q. But he would not figure in the traffic density.

A. In other words, these figures might be misleading assuming that every passenger who rode got on at Oregon City and bought a ticket and rode through to Portland. Be 100,000 passengers we will say. The next year every one who got on at Oregon City and rode to the Golf Links would be reported twice and would show they had carried 200,000 passengers.

Q. Referring to the exhibit 18: The item Maintenance of Way and various subaccounts, state whether or not in your examination you had opportunity, or rather, had the time to go back to the original vouchers and check them over?

A. No, we did not and could not do that; we assumed the items as posted on the books to be correct.

Q. State whether or not this was one of the statements furnished to you to be checked, or whether it was prepared for your own convenience?

A. No, it was prepared for my own convenience. I asked that it be made up and Mr. Johnson assisted me in making it up.

Q. Now in your estimate of traffic density to Milwaukee you confined yourself entirely to the Oregon City line, so called, as it appears on the books?

A. Yes sir.

304 Q. Do you know whether it is a fact that passengers travel to Milwaukee by way of Sellwood line, so called?

A. I understand they can go that way, or they could go that way. During the year 1907 they were running what was known as the Milwaukee Club car.

Q. I suppose it will be admitted, Mr. Griffith, that passengers do travel by way of the Sellwood line to Milwaukee?

Mr. GRIFFITH: I guess an occasional passenger gets on that.

Mr. AITCHISON: Did you make an estimate of the "occasional" passengers who got on the Sellwood car and rode to Milwaukee?

A. No, not particularly but he would be in there.

Q. Referring to exhibit 11?

A. Yes sir; as shown on the statement for the Sellwood cars. That is the 10 cent fares collected on the Sellwood cars.

Q. How many were there?

A. 24116; I had forgotten about that 15 cent fare.

Q. That of course, only includes the 10 cent fares and would not include passengers who paid 5 cents to the city limits and 5 cents in?

A. No, that only includes the 10 cent fares.

Q. That doesn't include the tickets either?

A. No, only cash fares.

Q. Is there any way of obtaining the number of passengers who travel on the Sellwood line by tickets?

A. No, I think not. They would be included in the ticket sales. They have a statement there showing the tickets sold. I guess that covers it.

Q. But you cannot tell how many travelled on the Sellwood cars as compared with the Oregon City cars?

A. No sir.

Q. You did not consider that in making up your estimate of the traffic density?

305 A. No sir; I had forgotten we made that up.

Mr. GRIFFITH: Do you know how many of the Sellwood fares, cash fares, were fares on the other lines?

A. No sir.

Q. Passengers do travel from Golf Junction to Cazadero line, do they not?

A. I understand they do.

Q. The cash fare on the Sellwood line might mean one going out on the Cazadero line or one going through on the Oregon City line?

A. Yes sir.

Q. Exhibit 11 shows 24116 10 cent fares collected on the Sellwood line during the year 1907, does it not?

A. Yes sir.

Q. Going either way?

A. Yes sir.

Q. With no means of telling whether they were going south on the Oregon City line or whether they went east on the Cazadero line from Golf Junction?

A. Yes sir.

Q. The traffic density indicates to the railroad man the amount of travel tributary to the railway line, does it not?

A. Yes sir.

Q. When you say that 60% of the travel on the Oregon City line originates north of and including the Oak Grove group of stations and Portland you includes The Oaks, did you not?

A. I think the question was the density of traffic of those two groups—10 and 15 cent groups—it woud appear that 60% of the traffic is north of those two points.

Q. Is it as a matter of fact from your figures?

A. The traffic density at those two points is 60% of the total on the Oregon City line.

Q. Referring to plaintiff's exhibit No. 17: You have shown thereon the total number of passengers during the year 1907 was 1,174,421 on the Oregon City line, and by plaintiff's exhibit No. 10

306 that the total number of passengers between Portland and Milwaukee and between Portland and the 15 cent group of stations, including both tickets and cash fares, was 317607. Now the proportion of the travel north of the 15 cent group of stations to the proportion of the entire travel on the Oregon City division which may be credited to the line north of the 15 cent group would — the proportion which 317607 bears to 1,174,421, *does*n't it?

(Same objection.)

(Overruled.)

(Exception noted and allowed.)

A. How about the passengers who travel on the Sellwood line?

Q. You mean the Milwaukee passengers traveling on the Sellwood line?

A. Yes sir.

Q. Without considering that at all and considering the figures as shown by the exhibits to be correct, is the proposition I have stated to you correct?

Mr. GILTNER: I object to that further for the reason that it does not take in all of the travel on the road and does not include the travel on the Sellwood road going from Portland. The question assumes that it does.

WITNESS: I do not know that I clearly understand it yet.

(Question read to witness.)

A. That is the same as the answer to Mr. Aitchison. Assuming that all the rest travel south of those points.

Mr. GILTNER: It does not include the Sellwood travel?

A. No sir.

Mr. GRIFFITH: But in your answer to Mr. Aitchison's question you said you considered the Oaks travel as being a part of the 1,174,421 passengers on the Oregon City line, didn't you?

A. I did not say anything about the Oaks but I thought surely there must be some 5 cent fares in there that had not been taken into consideration.

307 Q. But what I am trying to get at is: You considered those Sellwood fares as being a part of the entire travel on the Oregon City line, didn't you?

A. No sir.

Q. Then how did you get 60% of the passengers north of the 15 cent group of stations?

A. I did not say that. I said assuming that the rest of the travel is all south of those points that 60% of the travel would be north, but we have not taken into consideration the 5 cent fares from the Golf Links south towards Oregon City.

Mr. GILTNER: I don't believe the court knows what you are talking about and I know I don't, perhaps you do.

Mr. WEST: As I understand it, what both Mr. Griffith and Mr. Aitchison was trying to get at is that you are trying to find what per cent of the travel the 10 cent and 15 cent group bear to the whole travel on the road.

Mr. GRIFFITH: On the Oregon City division.

A. That is the way I see it. My conclusion of the matter is that I think it is all a guess. I can give you figures but when you come right down to it I do not see what you have to base the figures upon. You are not taking into consideration 5 cent fares. The fact of the matter is a 10 cent passenger might pay two 5 cent fares and there is the Oaks travel also. Some may go off on the Cazadero line and some to Sellwood.

Q. Figuring from the statements that have been prepared under your own supervision and are now in evidence here, and assuming that the 317,607 passengers from Milwaukee and the 15 cent group of stations represents the total number of passengers thereon, and assuming also that your total number of passengers as shown by the books were 1,174,421, the proportion north of the 15 cent group

would be the same proportion that 317,607 bears to 1,174,421, wouldn't it?

A. Yes sir.

Mr. GILTNER: The Sellwood cars have been running from
308 Portland to Milwaukee for the past three years with 15 minute service and I will ask you what has been the effect, as to whether the bulk of the passengers would not be going on the Sellwood line?

A. In my opinion they would take the first car that came along going their way.

Q. The Sellwood car?

A. I would take the first car that came along going in my direction.

Q. In that mathematical proposition that he has propounded here did you take into consideration the people who travel on special cars from Portland to the Oaks?

A. Why, the fares would be recorded.

Q. Is it reported in that 1,500,000?

A. All the fares are reported I suppose.

Q. The special cars would not be?

A. I think they were included.

Mr. GILTNER: Mr. Fuller has just told me they would not be. The people who ride on special cars from Portland to the Oaks are not included in that list.

A. I don't know. There are special fares collected as shown by the reports.

Mr. AITCHISON: They have an Oaks line?

A. Yes sir.

Q. And that Oaks line did not figure at all?

A. No sir.

Q. You left out all fares to the Oaks line?

A. Yes sir.

Q. Did you find any reference in their books to passengers who transferred from points south of Hawthorne Ave. to Nickum and Kerrigan?

A. No sir.

Q. Did you find any very heavy travel from Nickum to points on the Sellwood line?

A. No sir, I did not find any at all.

(Witness excused.)

309 C. N. HUGGINS recalled.

Mr. GRIFFITH: At the time the Portland Railway Light and Power Company purchased the properties of the Oregon Water Power and Railway Company what, if any, bonded indebtedness of the Oregon Water Power and Railway Company did the Portland Railway Light and Power Company assume?

(Objected to as not the best evidence.)

Mr. GILTNER: Was this assumption of this debt in writing?

WITNESS: On the acquisition of the property?

Mr. GILTNER: Yes sir.
WITNESS: Most certainly.
COURT: You can answer the question.
(Exception noted and allowed.)

A. They assumed a bonded debt of $4,431,000.00 created by the Oregon Water Power and Railway Company.

Q. What rate of interest, if you know, does that indebtedness bear?

(Objected to for same reason.)
(Overruled.)
(Exception noted and allowed.)

A. Six per cent (6%).
Q. How long do these bonds run?
A. I don't know the exact life of those bonds.
Q. Do you know if they are still in existence?
A. They are still in existence.

Q. What were the total taxes upon the property of the Oregon Water Power and Railway Company acquired by the Portland Railway Light and Power Company for the year 1907?

(Same objection.)
(Overruled.)
(Exception noted and allowed.)

A. Something over $37,000.00.

Q. What portion of the total taxes for the year 1907 upon the properties acquired by the Portland Railway Light and
310 Power Company from the Oregon Water Power and Railway Company has been included in the statements in evidence here as chargeable to the railways of the Oregon Water Power?

(Same objection.)
(Overruled.)
(Exception noted and allowed.)

A. Something over $25,000.00. I can give you the exact figures.
Q. Give them.
A. $25,240.16.

Mr. CRAWFORD: Do you know whether this bonded indebtedness was for any actual consideration or not, of your own knowledge?
A. I do not know. It was created before my time.
Q. Do you know what they sold for of your own knowledge?
A. No sir.

Q. This bonded indebtedness you refer to and other indebtedness includes other property besides the Oregon City line, does it not?
A. Yes sir.
Q. Quite a large amount of other property?
A. Yes sir.
Q. Water rights and things of that kind also?
A. Yes sir.
Q. I do not care to go into the specific items, but, as a matter of

fact, it covers a large part, and *do* does the taxes, on all this other property, don't they?

A. Yes sir.

Q. The bonded indebtedness and taxes are all you have mentioned are they?

A. Yes sir.

Mr. GRIFFITH: That is all. (Witness excused.) We rest. (Plaintiff's case closed.)

RICHARD SCOTT, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

Examined by Mr. CRAWFORD:

311 Q. State your name, age, residence and occupation.

A. Richard Scott, 62, Milwaukee.

Q. How long have you lived at Milwaukee?

A. Since 1883; May, 1883, I moved there.

Q. Since that time have you been acquainted with the conditions surounding Milwaukee?

A. Considerably; yes sir.

Q. You may state what is the character of the land around there.

A. Of the land?

Q. Of the soil.

A. It is good soil: as good as there is in the state f Oregon, take it as a whole.

Q. Are you acquainted with the soil around Lents?

A. Yes sir.

Q. State what that is.

A. That is what we would consider our poor land. The land is gravelly more or less.

Q. How long have you been acquainted at Lents?

A. About the same length of time.

Q. Were you acquainted with conditions around Lents prior to the 5 cent fare being put in operation to Lents?

A. I was acquainted there prior to any railroad.

Q. Do you know how many people there were along the line from Portland—along the Mount Scott line—at that time?

A. Just farmers along there.

Q. Were there to exceed 500 people along the whole line?

A. I don't think they would exceed a hundred.

Q. About what is the population there now?

A. Some 12 or 13000.

Q. What is the increase in population due to?

(Mr. GRIFFITH: State, if you know positively.)

A. To the means of getting there—the transportation and low fare.

312 Q. You may state what improvements there are around Lents as to water and electric lights, schools and things of that kind.

A. Well, their water there they have to dig for it, like they do

anywheres else. I don't think they have Bull Run water there. I know of one place in particular along that line, at Woodmere. I have had more or less to do out there and I know they have to get their supply from a well.

Q. Have they any electric lights in the street at Lents?

A. Yes sir.

Q. What are they?

A. They are electric lights and some arc lights.

Q. You may state as to Milwaukee—how has their population changed, if any, increased or decreased, in the last 5 or 10 years while that of Lents has built up.

A. Well, Milwaukee has increased a little in population but not very much.

Q. You may state as to the water at Milwaukee?

Q. We consider we have better water than at Portland.

Q. What do they pay for it—what are the rates?

A. The rate is the same as the Portland rate.

Q. Now then you may state about the lights at Milwaukee.

A. They are furnished by the General Electric Company. Stores and streets.

Q. At the same rate as Portland?

A I think so but I don't know. I do not live in the city and I am not acquainted with that as to the city lights.

Q. How are the schools?

A. Lents, I guess, have more schools than we have though our school—we have a very good school there.

Q. How about the telephones?

A. We are on long distance. I am. They have telephones at Lents. I think I have the only main 'phone in Milwaukee outside of the Sanatorium.

313 Q. Have Portland exchanges?

A. Yes sir; but they are both on long distance.

Q. Are there any manufacturing industries?

A. Yes sir; we have a shingle mill at Milwaukee but not as much as we had before we had the railroad. We had more manufacturers then than we have now.

Q. What was the cause of them leaving?

A. I don't know what would be the cause really. Maybe they got better transportation facilities where they have gone. When we had the boats they had three factories. They had 3 factories there when I moved to Milwaukee. *How* they have none.

Q. That is due then to the electric lines coming in and the boats being frozen out, you think?

A. Yes sir.

Q. What fare do you pay to Portland, cash or tickets?

A. We use both.

Q. How much do you pay for tickets and how much do you pay for cash?

A. We pay 7 cents for tickets and 10 cents cash.

Q. When you pay cash fare does the conductor usually ring up 10 cents fare or two 5s.?

A. Yesterday he rung up 10 cents but before he rang up two 5s.
Q. What is the reason for that?
A. You could not prove that by me.
Q. Are you acquainted with the road between Golf Junction and Nickum?
A. Yes sir.
Q. Do you know the size of the cut that was made in that grade between Golf Junction and Nickum?
A. It is about 200 feet wide and all the way from 60 to 20 feet deep.
Q. How much will it average—50 feet?
A. Very close to that I think.
314 Q. You mean that it is 200 feet wide on an average on the bottom or on the top?
A. On the top, and perhaps 50 feet at the base. It is a gravelly cut and consequently would not stand as another one would.
Q. What is the size—isn't there a fill in there between Golf Junction and Nickum?
A. Yes sir.
Q. Do you know the size of that fill?
A. It is between 4 and 5000 feet long. I could not tell exactly. It runs right north of my land.
Q. And the width at the top and bottom?
A. The width at the top varies from 15 to 20 feet, wider than the bottom.
Q. And the bottom?
A. From 100 to 300 feet.
Q. And about how high is it on the top?
A. It will go from 30 to 50 feet and up towards Sellwood it runs down to 25 feet perhaps and across the county road.
Q. Do you know what the angle of the banks are?
A. They vary very much there. Some places they run out very far but it does not stand at all. It is not like the usual angle of dump. It was made in wet weather and consequently it swam all over the whole country.
Q. Now what is the length of the cut?
A. That I am not so positive about, but I think about between 2500 and 3000 feet.
Q. You are well acquainted with the conditions then surrounding Lents and surrounding Milwaukee and Oak Grove, are you?
A. Yes sir.
Q. You are well acquainted with all the conditions surrounding those places?
A. Yes sir.
Q. And have been since 1883, you stated?
A. Yes sir.
315 Q. You are aware, of course, that the fare from Nickum to Portland and from Lents to Portland is 5 cents?
A. Yes sir.
Q. And that the fare from Oak Grove to Portland is 15 cents and from Milwaukee to Portland is 10 cents.

A. Yes sir.

WITNESS: From Lents to Portland it depends upon which way you go.

Mr. GILTNER: Over the Mount Scott division it is 5 cents?

A. Yes sir; 5 cents. Coming from Cazadero it is 10 cents.

Q. The Mount Scott div. is the one talked of in this suit.

A. Yes sir.

Mr. CRAWFORD: Would you consider 10 cents from Milwaukee to —considering all the conditions, taking all the conditions into consideration—would you consider 10 cents from Milwaukee to Portland without a transfer as being discriminatory against Milwaukee when Lents has a fare of 5 cents and transfers in the city?

A. Certainly it is. It is even from Nickum to there.

Q. And would be discriminatory, of course, against the citizens living in that place and vicinity?

A. Certainly.

Q. State whether or not it is discriminatory against Oak Grove to charge 15 cents to Portland without a transfer and from Lents to Nickum to Portland 5 cents with transfers?

Q. Well, it looks like it to me. I consider it a very high rate.

Q. And of course when I say Oak Grove I mean the people residing in that vicinity and the traveling public generally.

A. I understand; yes sir.

Q. Also Gates are in the same condition?

A. Yes sir.

Q. You may state whether there is considerable travel of children going to and back from school from those places?

A. Yes sir; there are children going back and forth to school from those places to Portland but I do not know how many.

Q. You may state whether you have been at one time in
316 your life engaged in transportation business?

A. I have, yes sir.

Q. You may state then how long you have been engaged in transportation business.

A. From 1890 up to the time the railroad was built up there. From 1885 until they first commenced to run a boat to Milwaukee.

Q. Now you may state whether in your opinion a five cent fare from Portland to Milwaukee would be a reasonable rate or not, taking all conditions—all existing conditions—into consideration.

(Mr. GRIFFITH: All the conditions you have had him testify to?)

Mr. CRAWFORD: All the conditions you know of your own knowledge.

A. I consider it a reasonable rate. I know if there were no cars I would like to run a boat there at that rate. I know that.

Q. You may state whether or not from your experience and also taking into consideration all existing conditions a five cent fare would be a reasonable fare from Portland to Oak Grove.

A. That is a little different. You are getting farther away all the time. From my point of view it would not be, not really to Oak Grove. You are off the water. From my point of view that would not be a reasonable rate. A street car running up to Oak Grove

makes a difference—it takes more power going to Oak Grove and things like that than going to Milwaukee a great deal.

Q. Would a ten cent fare be a reasonable rate?

A. Yes sir, I think it would.

Mr. GRIFFITH: Isn't it a fact, Mr. Scott, that on the Mount Scott line it is built up from the city clear out to Lents?

A. Yes sir.

Q. Isn't it a fact that on the Oregon City line from Mil-
317 waukee to Portland it is not built up at all?

A. From Milwaukee to Portland—that is true, is has not built up very much. It has started to build now.

Q. On these exhorbitant rates?

A. Yes sir; with the expectation of getting them lowered. There are several laying off now and there are a great many waiting to build there if a lower rate goes in.

Q. Did you ever hear of real estate agents booming all that country up to Arleta and Annabel and all that country out to Lents?

A. Yes sir.

Q. They boomed it continuously for years?

A. Yes sir.

Q. Good, live, energetic real estate agents boomed and advertised it all the time?

A. They advertised the five cent fare; that was their principal boom.

Q. You have a 7 cent fare?

A. Yes sir.

Q. And the people who go out to the country to live are the people who purchase the commutation tickets, are they not?

A. Some do and some do not. If they want a transfer in the city they do not purchase commutation tickets.

Q. If they are people who live out there where they can buy commutation tickets for less than the amount of cash fare and are people who are inclined to save a little money they would buy commutation tickets, would they not?

A. Yes sir, but I would like to ask Mr. Griffith a question.

Mr. GRIFFITH: I am not on the stand but go ahead.

WITNESS: He was talking about booming a place. You remember when Minthorn was started near Milwaukee. They had five cent fare if you remember. Do you remember how rapidly Min-
thorn built up? It built up just as rapidly as any suburb
318 could.

Q. Is there a house in it?

A. Plenty of them. They case 35 or 40 votes up there now.

Q. Good community is it?

A. Yes sir. It built up very fast as long as they had a five cent fare and when they withdrew the 5 cent fare it stopped building.

Q. Who withdrew it?

A. They had some arrangement with the O. W. P. people for five cent seats.

Q. Did they pay the O. W. P. any other consideration?

A. I don't know.

Q. Do you know whether they did; do you know whether they gave the railroad company any other consideration in addition to the five cent fare?

A. I don't know, but I know they had 5 cent seats and you had to live at Minthorn to get them.

Q. You have electric lights in the city of Milwaukee?

A. I don't live in Milwaukee.

Q. You know they are there?

A. Yes sir.

Q. You know they are there in private service as well as municipal service?

A. Yes sir.

Q. The same as at Arleta?

A. Yes sir.

Q. Is there anything to compare with the amount of travel from points between Lents and Mount Tabor Junction on that portion of the Oregon City line between Milwaukee and Golf Junction?

A. No sir; you have a great many more passengers to carry on the Mount Tabor line.

Q. How many more? What proportion would that be of the whole, or how would you compare the two?

319 A. I should consider you would have 10 to 1 perhaps. That country is built up more.

Q. What was this about the factories formerly in Milwaukee? How many people did they employ?

A. There is the Portland Stove Factory I think was the name. They employed about a dozen men making stoves. That is the same factory that is now over here at the penitentiary. Then Weeks (?) was there manufacturing window weights and other castings, and also Aitke (?) & Aitke, they cast castings for the furniture factory.

Q. They were all there before the railroad was put there at all were they not?

A. Yes sir.

Q. And they were transporting their people back and forth by boats?

A. Yes sir.

Q. What was the fare?

A. The same as it is now—7c. and 10c.

Q. Who had the boats?

A. I owned them.

Q. You considered that a reasonable fare?

A. Yes sir, on the boats. We charged 5c to Sellwood.

Q. What was the rate on freight?

A. $1.00 per ton, and then we carried baggage as well. On a 7 cent ticket we allowed 150 lbs. baggage the same as railroads.

Q. There has been no increase in the rates between Portland and Milwaukee since the railroad company went into operation?

A. How do you mean?

Q. It is just as cheap as when you run your monopoly there?

A. Yes sir.

Q. So then it was not because of transportation conditions they left there?

320 A. You could not carry baggage like they did on the boats.

Q. The cars cannot carry baggage and because you took off your boats they had to leave?

A. Their rates are higher than the boat's ever were.

Q. But the river is still open?

A. But the boats don't run.

Q. The river is still open and if the boats want to run they can?

A. No sir. The dock at Milwaukee is not good. They can but they don't care to. The landings have not been kept up.

Q. Would they if the business kept up. The boats did not quit because there was no business?

A. The boats where they used to land at the mill landing cannot land there on account of the grade, changed the car line.

Q. Is that the only possible landing at Milwaukee?

A. Yes sir; the boats don't like to land at the ferry landing on account of too many rocks. A boat is liable to land there with a load or to take off a load and when she pulls out she may have a hole in her.

Q. Which side of the present location of the tracks of the railroad were those foundries located?

A. One was located on the street going out to McLaughlin's and the other to Milwaukee Heights.

Q. On the river street?

A. Yes sir.

Q. And this change in the car line by the railroad company did not affect transportation to and from the foundries?

A. Oh, yes sir; they would have to come down the road and go over the grade.

Q. Do you know why they moved away from Milwaukee?

A. No sir.

Q. Was it because this railroad company came in there and established a railroad?

A. I don't believe it was that.

321 Q. Or because some other locality offered better inducements?

A. It was probably because of the inducements offered other places and the factory burned down at Sellwood and that took away the place where they were manufacturing castings for. They used to make all the school desks made on the coast. They were almost all made by him. We had the ferry at Willsburg at that time. That burned so that shut them off.

Q. How many people are there in the town of Milwaukee, Mr. Scott?

A. In the town or in the school district?

Q. In the town.

A. Perhaps 2000.

Q. How many of those are families of employés of this company?

A. I could not say.

Q. A considerable number of them?

A. I think not.

Q. The car barns of this company are located at Milwaukee, aren't they?

A. Yes sir.

Q. And they employ a large number of men there?

A. Yes sir.

Q. Do the men who have families and work for the company live in the town of Milwaukee?

A. Some of them do but not a great many.

Q. Did your transportation affairs have anything to do with locating the shingle mill at Milwaukee recently?

A. I think not. I think that was located there on account of being a good location.

Q. Natural advantages?

A. Yes sir.

Q. What is the fact as to the location of the saw mill there?

A. They employ some men.

Q. That is not due to discriminatory rates?

A. I think it is.

Q. It is the natural advantages and not the transportation that induced them to move there?

322 A. I think not; I think otherwise.

Q. Isn't it a fact that the Hawley(?) Company will build its saw mill at Milwaukee because they can bring logs there?

A. Yes sir.

Q. And that then they can transport them on over the railway lines to Oregon City? That is possible, isn't it?

A. I don't know how that would be but it is possible.

Q. If this railroad company were not operating and were not capable of hauling the products of Hawley to Oregon City, they would not locate there, would they?

Q. I don't see why because the boats could haul for them.

Q. You don't know what the location is—you don't know, as a matter of fact, that it is practically impossible to get logs or wood up to the pulp mill where the Milwaukee plant would be located?

A. I don't think it would be impossible. All the freight up and down the valley used to come there.

Q. You don't know anything about the manufacture of pulp, do you?

A. It is just as easy to take a log up there as it is to take it to a saw mill, every bit.

Q. Have you always noticed the conductors on the cars ring up when you pay your fare?

A. I have noticed lately.

Q. Do you make it a practice to notice?

A. Except once in a while when he doesn't forget to register it.

Q. But you do not have a habit and fixed custom of watching that register every time you pay your fare?

A. I notice it a great deal if it is right in front of me; I could not help but see it.

Q. But you aren't prepared to say that the conductors always ring up two 5 cent fares instead of a ten cent fare?

323 A. He has lately.

Q. What did he do before?

A. Rang up ten cents because we were fools enough to give it to him.

Q. Which line do you travel on?

A. Whichever car is there when I want to go.

Q. Whichever car is there first when you want to go?

A. Yes sir.

Q. Do you know where the fill is on the Cazadero line across the city boundary line of Portland?

A. It doesn't cross it.

Q. Are you positive about that?

A. Yes sir.

Q. Do you know just where the boundary line is?

A. I ought to. It crosses right there, just beyond Johnson Creek, perhaps 250 feet.

Q. The boundary—the eastern boundary line of the city crosses the fill doesn't it.

A. About 250 feet, perhaps a little over.

Q. How high is that fill where it crosses the city boundary line?

A. Pretty close to 50 feet.

Q. Is there any way, road or otherwise, to get to the railroad tracks at the city boundary line on the Cazadero line? Could you get to the city boundary line at the point of intersection of the Cazadero line by traveling on any public road, street or way?

A. No, sir; there is no road there except the bridge at Clackamas County. There is a bridge crosses a little ways from the county line.

Q. So that if a station were established on the city boundary line it would be impossible to get to it?

A. Except you had steps.

324 Q. How could you get to the steps?

A. I don't know whether they have that street vacated or not. I think there is 12 feet of a street along my line.

Q. You are not positive of that?

A. The railroad company used it.

Q. Has it ever been opened to general travel?

A. It never has.

Q. The first road after crossing the city boundary line is at Nickum?

A. No sir; no road at the station.

Q. What is the fact?

A. The bridge is there. Nickum station is down perhaps 35 or 40 feet and up a flight of steps.

Q. But that is the nearest point you can get to a station?

A. That is the nearest point. Rumor said they would stop at Willsburg.

Q. Isn't it a fact that the road is either on a fill or in a cut and it would be practically impossible to get peopl*e* to it except by traveling over private property?

A. No, I would not consider it impossible, because I do not know whether that street is vacated or not.

Q. But you do know that it has never been opened to common travel?

A. No sir; it has not.

Mr. CRAWFORD: I think you stated the steam roads of the Southern Pacific Company and others carried 150 pounds of baggage free?

A. Yes sir.

Q. You may state whether this Oregon City electric road carries any baggage free or not.

A. They will let you take a grip but they will not take trunks. The last time my daughter came down they charged me 50c.

Q. The 150 lbs. of baggage also on the steam road is in
325 addition to whatever grip a man may take with him, isn't it?

A. Yes sir.

Q. That same rule applies to the electric line rates in taking baggage to Milwaukee and these other points to which you have testified?

A. Which road?

Q. On the Oregon City line? They charge 50 cents per cwt. for baggage from Milwaukee?

A. 50c for a trunk. I don't know whether that is the rate for 100 lbs. or 200 lbs. or less.

Q. You don't know what it is per hundred?

A. No, just for a trunk.

Q. That is the same rate as a steam road?

A. Yes sir.

Q. You may compare the population of Lents with the population of Milwaukee 8 years ago, if you please.

A. Lents then hadn't enough living there even to have a school house, I don't think. It seems to me they had a joint school district between that and another place, while we have always had a school. At that time we had a four-room school house and all running.

Q. You may state whether or not the O. W. P. owns the boats that are running on the river now?

A. I think not.

Q. Did they own them up to the last transfer?

A. I think not, I do not remember.

Q. What company did?

A. The O. R. & N. and the Oregon City Transportation Company.

Q. Do you know whether they do or not?

A. Who?

Q. The Oregon Water Power—whether they own them or not?

A. No sir, I don't know.

Q. You may state, if you know, whether the company owns land at Sellwod and virtually compelled its men to buy there and
326 and live there or a great majority of them.

A. That I am not familiar with at all.

Q. Do you know whether a majority of them do live there?

A. Yes sir.

Mr. GRIFFITH: What is the fare from Portland to Milwaukee on the Southern Pacific?

A. If you have a ticket it is 25 cents for a round trip or 25 cents one way.

Q. Can you buy a ticket either way?

A. I don't think you can buy a ticket to Milwaukee.

Q. By buying a ticket it is cheaper that way—12½ cents a ride on the Southern Pacific?

A. I think if you ask for a ticket—for a round trip—they would give it to you at the same price as one way.

Q. Or 25 cents cash fare one way?

A. Yes sir.

Q. On one of these tickets are you permitted to carry baggage?

A. Yes sir; 150 lbs. if you have it.

Q. That is the general rule on a railroad, isn't it?

A. Yes sir.

Q. And the fare is 3 cents a mile?

A. Yes sir.

Q. Isn't it a fact that the freight rate from Portland to Milwaukee is 10 cents per 100 lbs. with a minimum charge of 25c?

A. I could not say as to that. I know I gave the man—it had to be prepaid, and he charged me 50c.

Q. Do you know what it weighed?

A. No sir.

Q. Do you know whether that was for railroad fare and for delivery charges in the city?

A. Had to be delivered in the city.

Q. To whom did you pay the charge?

A. To the agent on the train.

Q. On the train?

A. On the O. R. & N. Co.

Q. Did you ever pay 50 cents to move a trunk on the O. W. P.?

327 A. Yes sir.

Q. When they used to have a wagon of their own.

—. ———.

Q. They delivered in the city of Portland?

A. For delivery in the city of Portland.

Q. What did the 50 cents cover, Mr. Scott?

A. The 50 cents covered taking it to the car and delivering it in Portland.

Q. From what point?

A. They would not take it from the Union Depot.

Q. But they would take it from some other place in the city of Portland?

A. Some place that was convenient.

Q. That was when the O. W. P. maintained wagons in the city of Portland?

A. Yes sir.

Q. And the wagon delivery was separate from the transportation?

A. Yes sir; it was, but I am satisfied that I paid 50 cents the last time for delivery.

Q. Then you are not familiar with the rates charged by the company governing such traffic?

A. No sir. I never ship anything by them because I get materials by boat.

Q. Do you still have the boats?

A. Yes sir.

Q. The boats still come up there and land there?

A. My freight this year has all come down the river.

Q. There is competition there all the time between the railroad and the boat then?

A. Competition; you know what it is. There is a general agreement all around—I charge so much and you charge so much.

Q. You don't know anything about that, do you?

A. I don't know t-at this company has any.

Q. You don't know of your own knowledge that any such
328 agreement exists, do you?

A. Not with this company but it does between the boats and the railroads. That we know.

Q. This 50c charge you say you paid on your trunk the last time was not paid to an agent of the O. W. P., was it?

A. No sir.

Q. To whom was it paid?

A. To the man on the train who got the check.

Q. Coming into Portland on the O. R. & N.?

A. Yes sir.

Q. And you don't know what he paid them?

A. He said it would be 50 cents to take it to Milwaukee and a 50 cent charge for transferring and I took his word for it.

Mr. CRAWFORD: On what line was that?

A. On the O. R. & N. coming into Portland.

Q. It is a fact, isn't it, that this Oregon City line management charge extra for every little package carried no matter what it is?

A. Not when it is carried by the passengers like a grip.

Q. I mean unless they are carried by the passengers or something they can carry in their lap?

A. Yes sir.

Q. And no baggage is taken free the same as on the railroads?

A. That is all—only what people carry themselves, grips or anything like that they would carry I suppose.

Mr. GRIFFITH: How far is it from the line of the O. W. P. running through Milwaukee to the station of the Southern Pacific Company called Milwaukee station?

A. It is half a mile distant from the O. W. P. line to the Milwaukee station.

JOHN RISLEY, a witness produced on behalf of the defend-
329 ant, after being duly sworn, testified as follows:

Examined by Mr. CRAWFORD:

Q. State your name, age, residence and occupation.

A. John Risley, age 46, residence Oak Grove; that is I reside right next to Oak Grove, occupation farmer.

Q. How long have you lived at Oak Grove?

A. About 46 years.

Q. Are you well acquainted with the conditions surrounding Oak Grove, Milwaukee, Sellwood and Lents?

A. I am.

Q. And Nickum?

A. Yes sir.

Q. You may state relative to the travel from Oak Grove to Milwaukee and from Sellwood to Oak Grove, as to the amount of travel.

A. Well, there is quite a bit of local travel between Oak Grove and Milwaukee. There is a number of people goes down there every day, more especially evenings and Sundays; and also there is quite a bit of local travel between Oak Grove and Sellwood. Nearly all Oak Grove people have two sets of books; one they use for—they use both about the same time.

Q. You may state whether you know anything concerning baggage as carried on the electric road and Southern Pacific or steam roads and boats as to charges being made for the same.

A. Personally I do not know anything about that. I have carried grips on the cars and there has been no objection made to it whatever. I have never shipped any baggage over the car lines as baggage. Of course, I know the Southern Pacific will carry 150 lbs. baggage.

Q. Will the electric line do that?

A. No, they will not on the regular cars.

Q. Have to send it by freight and pay extra?

A. Yes sir.

Q. Do you know what the relative conditions of Lents travel and Milwaukee travel were prior to the time of the 5 cent fare
330 which has been installed from Lents to Portland?

A. Well, prior to the 5 cent fare I used to ride out to Lents on my bicycle a good deal and there were no people out there at all. There was nothing around Lents at all except a couple of houses and Milwaukee was practically *the* in the same condition as it is now, though of course it has built up a little since.

Q. Well, how about Lents now—about how many inhabitants would you judge there are along the line from Lents to Portland?

A. Well, I would not be in a position to judge of that but it is very thickly built up with houses. I know there are houses, you might say, all the way nearly there, at least two or three houses to every block along the line and extending back quite a distance from the line also. I do not know how far back from the line.

Q. From the Portland city limits to Lents, including Lents?

A. Yes sir.

Q. About how many inhabitants has Lents proper, what is known as the town of Lents?

A. I should judge between 500 and 600.

Q. Before the 5 cent fare?

A. Not at that time; not to exceed 25 or 30—not that many.

Q. You do not know how many people there are from the city limits out then- now?

A. No sir, I don't.

Q. Do you know anything about the water advantages?

A. I have been told by people who reside there that it is all obtained from wells.

Q. You do not know of your own knowledge?

A. I have seen the pump working there but I do not know anything much about it.

Q. Do you know anything about the lights?

A. They have electric lights.

331 Q. At Lents?

A. I don't know particularly as to Lents but along the track going out there, there are lights along the streets.

Q. Compare the land around the vicinity of Lents and the vicinity of Milwaukee.

A. Very dissimilar. The soil around the vicinity of Milwaukee is what I call high class land and around Lents it is very gravelly and not good for purposes of cultivation.

Q. What effect would the character of the Lents land have in its being difficult to settle up a community?

A. According to my information good soil in a community it should settle up much faster than one with poor soil. It should always work out that way.

Q. To what would you attribute the fact that it is built up at Lents and comparatively still at Milwaukee?

A. Cheap car fare at Lents and high car fare at Milwaukee.

Q. You understand in referring to Lents I mean the part of the country along the line of the Mount Scott line from Annabel out away from the city.

A. Yes sir.

Q. You may state whether they always had good schools or not at Milwaukee? How about the schools there?

A. They have always had a very good school there; yes sir.

Q. How long did you say you were acquainted with the conditions around Milwaukee and Lents?

A. Around Milwaukee I have been acquainted with them ever since I have been big enough to know anything, and around Lents for the last 12 or 14 years.

Q. Intimately acquainted with the conditions around Lents?

A. Not intimately but fairly well acquainted.

Q. You may state whether, under existing conditions, a five cent fare from Lents to Portland including transfers and a ten

332 cent fare from Milwaukee to Portland not including transfers is discriminatory or not.

Mr. GRIFFITH: We object as incompetent, immaterial and irrelevant and as calling for the conclusion of the witness.

COURT: You may testify—you may answer the question based upon your knowledge.

(Exception noted and allowed.)

WITNESS: In my opinion it is discriminatory.

Mr. CRAWFORD: You may state whether you are acquainted with all existing conditions at those places and have been for a number of years—with Oak Grove as compared with these other places that you have testified to surrounding including Gates?

A. As to the conditions at Gates I am not familiar but Oak Grove I am familiar with.

Q. You may state whether you would consider it, from your experience and from your knowledge of all existing conditions, whether it is discriminatory against Oak Grove by this railroad company to charge 15 cents to Portland from Oak Grove and 5 cents from Nickum and Lents to Portland?

(Same Objection.)

(Overruled.)

(Exception noted and allowed.)

A. My opinion is that it is discriminating against Oak Grove and vicinity.

Q. You may state what is the effect of charging a low rate to the suburbs of a large city—to some of the suburbs—and a high rate to other suburbs of a large city?

A. It fills up those having cheap rates and retards those having high rates.

Q. Why will it?

A. The working classes of people want to go to a place where they can get a cheap rate because they cannot afford to pay a high rate of car fare.

Q. You may state whether the lands in the suburbs are
333 much cheaper than they are in the heart of the city?

A. They are.

Q. You may state whether the working people at Lents particularly can afford to live in the heart of the city?

A. They cannot.

Q. You may state what effect these rates in existence have had upon Oak Grove and Milwaukee as compared to Lents?

A. In regard to Oak Grove it has retarded the Oak Grove population quite materially, and it has had the effect of keeping telephone service and electric light service out of the place.

Q. How about Milwaukee?

A. Milwaukee has electric lights on the streets and in some of the stores.

Q. How has it affected the growth of the city as compared with Lents?

A. It has retarded the growth.

Q. You may state whether the existing rates have any effect upon land values?

A. They do.

Q. Then you may compare land values at Lents with the land values at Oak Grove and Milwaukee.

A. Well, according to the real estate advertisements I have read in the papers and posted around at Lents and vicinity the lots sell all the way from $250.00 to $400; land around Oak Grove some has been sold during last week at about $250 per acre.

Q. How about Milwaukee?

A. I do not know of any sales being made around Milwaukee lately.

Q. None at all?

A. No sir.

Q. What is the average size of a lot?

A. 50 x 100.

Q. About how many will there be to an acre?

A. About 8.

334 Mr. GILTNER: What relation does Lents, Gates, Oak Grove, Milwaukee and St. Johns bear to the city of Portland?

A. All suburbs.

Q. Are they all connected to Portland by this electric line?

A. They are all connected with Portland.

Q. Do you know the distance from Lents to St. Johns?

A. Approximately 16 miles.

Q. And what it costs to ride on this line from Lents to St. Johns?

(Mr. GRIFFITH: If the Court please, I desire at this time to object to any evidence in regard to the St. Johns Line. It is not in controversy here and it is not mentioned in the pleacings which is the basis of this suit. Any evidence regarding the St. Johns line is entirely incompetent; it is not owned by the plaintiff in this case and it is owned by a separate corporation entirely and it cannot be considered when compared with any other point—Lents and Portland and Nickum and Portland as compared with the question of Oak Grove and Milwaukee.

COURT: Answer the question.

(Exception noted and allowed.)

WITNESS: 5 cents.

Mr. GRIFFITH: Did you ever travel from the town of Lents to the town of St. Johns in one continuous trip?

A. No sir.

Q. Do you know whether or not people traveling from Lents do that as a matter of habit or as a usual thing?

A. If they have occasion to go there on business they do.

Q. Did you ever know of an occasion where they did?

A. People have told me they have.

Q. Do you know anyone who did?

A. A number of people have done that.

335 Q. Have they done that for the purpose of testifying before the Railroad Commission?

A. No sir.

Q. Mr. Paget was one of these people, was he, that travelled over that line for that purpose?

A. No sir, he told me——

Q. (Interrupting.) He made that particular trip?

A. As I remember his testimony before the commission he told the commission that he did not make the trip for that purpose.

Mr. GRIFFITH: The record will show that.

Q. What is the fact as to the Mount Scott line which you have called the Lents line in your testimony, being built up in that territory inside the city limits of Portland? Does it run through a thickly populated part of the city of Portland?

A. From Madison st. out is pretty thickly populated.

Q. And cars on that line stop at every street corner, do they not, where any one can get on or off?

A. I have seen cars that would not at some particular time of day but at other times they do.

Q. That is when the rush of travel is on?

A. Yes sir.

Q. And at other times they do stop according to your own knowledge?

A. Yes sir.

Q. The travel on the Mount Scott line, Mr. Risley, does not come entirely from Lents does it—the town of Lents?

A. Not from the terminus of the line; no sir.

Q. As a matter of fact there is only a very small proportion that originates in the town of Lents?

A. I have ridden out there when the car seats were practically all full and in the meantime the aisles got full coming in.

Q. At what time of the day?

A. In the mornings between 9 and 11 and in the afternoon.

Q. Does the entire population of Lents come to town in
336 the mornings and go back in the evenings?

A. Not that I know of.

Q. You say the town has a population of 500?

A. Yes sir.

A. It would take the entire population to fill the cars?

A. Yes sir.

Q. The proportion of travel for a town of 500 population would be small?

A. Yes sir.

Q. The town of Lents has had 5 cent car fare for how long?

A. I could not tell you exactly but it has been six years I should judge.

Q. Seven years; since 1901, isn't it?

A. I could not say positively about that.

Q. That fare has been in effect all that time out to Lents?

A. As far as I know.

Q. Lents is about the same distance from 1st and Alder sts. in the city of Portland, isn't it?

A. About the same distance according to the maps of the company at Milwaukee Heights.

Q. Isn't it a matter of fact, Mr. Risley, that the population of Milwaukee, and if you will include Milwaukee Heights, also, has increased just as much during the last seven years in number as the town of Lents has increased?

A. Mr. Crawford said the town of Lents included all this territory out to Lents.

Q. You said yourself the town of Lents had a population of 500.

A. No the town of Milwaukee has not been built up as much as the town of Lents?

Q. The town of Lents proper?

A. It has not.

Q. Do you know the value of property right in the town of Lents?

A. What I have seen on the signs posted out there.

337 Q. You don't know anything personally about that?

A. I never bought any or sold any.

Q. Do you know the price of any houses or blocks in the town of Milwaukee?

A. I don't know.

Q. During the last seven years, Mr. Risley, the territory between the town of Lents proper and the city limits of Portland on the Mount Scott line has built up, has it not?

A. It has.

Q. Has the territory between Golf Junction, on the River div. of the O. W. P. built up—between Golf Junction and the city of Portland?

A. It has not.

Q. Has that territory between Golf Junction and Milwaukee built up?

A. It has not.

Q. Are there any more people in there now than there were 7 years ago?

A. There is not, except one more house built between Golf Junction and Milwaukee.

Q. Is it not a fact, Mr. Risley, that passengers on the Oregon City line, that very few passengers on the Oregon City line get on the cars going north after the car leaves Milwaukee?

A. Very few except betwen Milwaukee and Golf Links.

Q. Between Milwaukee and 1st and Alder sts.?

A. Quite a number get on at Golf Links.

Q. How does that number who get on the cars at Golf Links on the Oregon City line compare with the number of passengers getting on the Mount Scott cars between Lents proper and 1st & Alder sts. on that line?

A. It has no comparison at all with that.

Q. 10 or 15 to 1, isn't it?

A. 10 or 15 to one get on the Mount Scott to one that gets on the Oregon City line at Golf Links.

338 Q. The travel is very much greater than between Lents proper and 1st and Alder sts. on the Mount Scott div. than between Lents and Milwaukee on the other?

A. Yes sir.

Q. Do you know anything about the contract between the Portland City and Oregon Railway Company and the Chicago, Portland and Mount Scott Railroad Company regarding 5 cent fare?

A. I do not.

Q. When you said you were considering all of the conditions surrounding fares between Portland and Lents proper did you take that into consideration.

A. I understand the people in Milwaukee also have contracts with the company in regard to special rates—some do.

Q. Are those contracts here?

A. Not that I know of.

Q. You don't remember ever having seen one?

A. I have seen the one I have with the company.

Q. What is the contract you have?

A. They were to give me a cent a mile rate between Risley and Portland.

Q. You do get that cent a mile rate, do you not?

A. On commutation tickets I do.

Q. And that cent a mile rate is put on at every other station in the Oak Grove group of stations, isn't it?

A. I do not know whether they figure it at a cent a mile but I suppose so.

Q. And on commutation tickets the rate is practically a cent a mile to the Oak Grove group of stations, isn't it?

A. I think so.

Q. And it is practically a cent a mile to that group of stations? It is 6.71 miles and the rate is 7 cents, isn't it?

A. The rate is 7 cents and if the distance is right it is correct.

339 Q. Have you heard of any sales of land at Oak Grove at $1000.00 per acre?

A. No sir.

Q. Do you know of any attempted sales or rates of sale for portions of lands enclosed in the company's right of way fences?

A. I have not heard of any.

Q. Have you any knowledge of any instance where the fences of the company have been placed outside of its right of way and included lands for which they want anywhere from $1000.00 per acre up?

A. I don't.

Q. Did you hear of a sale in Oak Grove of 11 acres for $12,000.00?

(Objected to as incompetent, etc.)

(Overruled.)

(Exception noted and allowed.)

A. I have heard of a tract of land of 11 acres selling for $9000.00.

Q. When was that?

A. Two or three weeks ago.

Q. That was $750.00 per acre?

A. I think so.

Q. Where is this $250.00 per acre land?

A. 700 feet back from the station.

Q. Was it just as well placed as the $750.00 land?

A. It does not face on the motor line; that is, if you refer to the Wetzler tract.

Q. Would you say $750 per acre was a reasonable value for land along the motor line?

A. I would not pay that much for that particular tract.

Q. What made it of more value than others?

A. This tract back 700 feet is brushy and has no frontage on the motor line and people cannot have the view out; the other piece faces on the motor line and is right close to a station.

Q. The transportation facilities there have nothing to do with increasing the value of that land has it?

A. It undoubtedly has. If it had no transportation facili-

340 ties it would not be worth much.

Q. What was the value of the lands about Oak Grove before the railroads were put through there?

A. Well, from $50 to $75 for cleared land per acre; then the timber lands was held at practically the same price because it was held for speculation.

Q. And the value of land has grown to from $250.00 to $750 per acre despite the fact of the discriminatory rate?

A. I don't think it has grown to that.

Q. I understood you that during the 7 years Lents proper had a 5 cent fare the population has grown to a total of 500 people?

A. In my judgment it has.

Q. That is all there *are* in the town of Lents?

Q. I would not say that.

Q. Your judgment is that would cover all the people in the town of Lents?

A. I don't know the exact boundaries of the town of Lents. If you restrict me to the immediate or exact boundaries I could not tell you.

Q. Very small community, isn't it?

A. I don't know the size. It is comparatively small taking Lents proper.

Q. And all these people travelling on the Mount Scott line the great bulk are very close in to the city line?

A. Not the great bulk; no sir.

Q. Isn't it a fact that the great majority are west of Arleta?

A. Perhaps the majority are but then, as I understood you, by "the great bulk" you would mean about 9 to 1.

Q. We will say "majority" then. Now how large a majority are West of Arleta?

A. I could not tell you exactly.

341 Q. Can you approximate it?

A. No, I cannot; I never looked the matter up for that purpose.

Q. You don't know anything about the effect upon transportation rates of having a number of passengers on one line of railroad to be carried a short distance and another number of passengers upon another line of railroad to be carried a greater distance?

A. I have never had any experience in transportation.

Q. So when you say these rates are unjustly discriminatory towards Milwaukee you merely figure that you live in Milwaukee or near Milwaukee and that you pay more to ride to the city of Portland than those living at Lents do?

A. Yes sir.

Q. And you do not consider the great bulk of passengers on the Mount Scott line who do not ride all the distance to Portland?

A. That would have some effect on it.

Q. Has that occurred to you before—do you think that would have any effect as to whether or not a rate was unjustly discriminatory?

A. It would have a limited effect.

Mr. CRAWFORD: You stated it was quite thickly settled from Annabel to Lents, Annabel being on the boundary of the city?

A. Yes sir.

Q. All along the line, and I understood you to have stated that that was mostly people who have built up along there since they had the five cent fare?

A. That is my remembrance of it.

Q. There are about 15 stations between the city boundary and Lents proper, isn't there?

A. There are about that many.

Q. You refer to Lents as a little station right at the eastern end, the farthest end of the line?

A. Yes sir.

Q. And that Lents station is what you call Lents?

A. Yes sir.

342 Q. And that is what you meant when you stated that it had grown up to 500 in five years?

A. Yes sir.

Q. Take from the Madison St. bridge to Golf Links on the Oregon City line, isn't it thickly settled all the way nearly; that is, on the Sellwood line I mean?

A. On the Sellwood line it is thickly settled all the way.

Q. About the same as on the Lents line?

A. Yes sir.

Q. And also to the Golf Links there is a five cent fare, isn't there?

A. Yes sir.

Q. Have you ridden on the Sellwood line frequently?

A. I ride quite frequently from the Golf Links into Portland.

Q. Mornings and evenings?

A. Mornings and evenings; yes sir.

Q. You do know then it is a fact that there is hardly standing room on the Sellwood cars mornings and evenings?

A. I know it from observation but not from actual experience. I have seen the cars start out from 1st & Alder sts. when they were hanging on the steps.

Q. That is the same car that runs through to Milwaukee?

A. They were marked Sellwood cars.

Q. Between Golf Links and Milwaukee it is about a mile or so?

A. Practically that.

Q. Now then that territory between Golf Links and Milwaukee is nearly all owned by the Golf Links Association for the purpose of playing golf, isn't it?

A. It is.

Q. And it isn't open to settlement at all.

A. I understand there is to be no houses built upon it at all.

Q. Could not be?

A. No sir.

(Witness excused.)

At the hour of 12:10 p. m. Court took a recess for lunch. Reconvened at the hour of 1:00 o'clock p. m. Appearances same as before.

343 GEO. N. HIVELY, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

Examined by Mr. CRAWFORD:

Q. State your name, age, residence and occupation.

A. Geo. N. Hiveley, at present Rural Mail Carrier, resident of Milwaukee, age 49 past.

Q. How long have you lived at Milwaukee?

A. Since August, 1894.

Q. Were you ever in the employ of a railroad company?

A. Yes sir.

Q. Of what railroad company?

A. Well, on the East Side Railway, and then, after it got to be the—after it changed names after that; in fact I was their trackman. I worked for the company from 1894 until 1901 or 1902.

Q. Where were you working?

A. On the lines—Oregon City, Mount Tabor and Mount Scott.

Q. Were you ever a track walker on the Mount Scott line?

A. No sir; I was road master or track foreman for about 4 years, from 1894 to 1901.

Q. That was on what we call the Lents District on the Mount Scott line?

A. In the Lents district on the Mount Scott line; yes sir.

Q. What was the fare to Lents at that time from Portland?

A. 10¢.

Q. What was the travel out there at that time as to being very much or little?

A. Take the travel along about 1896 to 1901 there really was not much travel there.

Q. About what was the population from the city boundary
344 line to the station of Lents including half a mile on each side of the road say at that time?

A. I don't know just where the boundary line was really.

Q. It is at Annabel.

A. From Annabel out to Lents taking half a mile on each side

of the track I do not think it would amount to a thousand people all told.

Q. What would it amount to now?

A. Well, take a half mile on either side of the track from Annabel to Lents *how* I would judge 10 or 12000 would be a low estimate. I do not know what the population is exactly.

Q. What caused it to build up that way?

A. I do not just remember the time the 5 cent fares was inaugurated exactly but it never built up much before.

Q. To what do you attribute the building up of that district?

A. I attribute it to the 5 cent fare.

Q. You are a rural mail carrier, now, are you?

A. Yes sir.

Q. Where is your route?

A. I have route 2 from Milwaukee. The line runs from Milwaukee to Willsburg and then from there to what is called Woodstock, and out past Tremont—that is a station on the Mount Scott car line; that is about, perhaps ¾ of a mile from Lents.

Q. Have you been acquainted with the Oregon City line from Milwaukee to Portland during this same time?

A. I was track foreman for that line from 1896 to 1901 or 1902.

Q. And also from Portland to Oak Grove at the same time?

A. I am familiar with all that country.

Q. How is the improvement on the line from Oak Grove to Portland and the line from Milwaukee to Portland—how does that improve on those two lines compared with the improvement on the Lents division during the same time?

345 A. Well, really, the Lents country has built up more than any country around there really.

Q. About what is the ratio of improvement between the two districts?

A. Well, I do not think there was over 10 or 1200 and now there must be that many thousand on the line from Annabel to Lents.

Q. What would be the proportion of gain as compared with the line from Portland to Milwaukee?

A. The line from Portland to Milwaukee has been built up very little. It has not built up a great deal.

Q. And how about line from Portland to Oak Grove?

A. Well, Oak Grove, I really believe has been built up a little more than Milwaukee, but, of course, it is nothing compared with the Lents country, really.

Q. You may state whether the natural advantages at Milwaukee outside of transportation—the natural advantages—are equal to those of the Lents district?

A. Well, Milwaukee being close to the river and it is a beautiful suburban town, the most beautiful suburban part of Portland, while Lents is a dry, barren country and is gravelly. No inducements there for people to buy more than to buy a home where they can get five cent fare.

Q. What are the natural advantages of Oak Grove as compared with Lents?

A. Oak Grove is a country that is high and it as a beautiful place for a home; the land is better, really, than at Lents, while at Lents the land is gravelly and not much good for building purposes.

Q. Then is there any reason you can conceive of why Milwaukee and Oak Grove should not advance in population and improvement except the difference in fare?

A. Really, not using prejudice toward any one, I cannot
346 see any other reason in the world.

Mr. GRIFFITH: When you first became acquainted with the Mount Scott line it was not operated by the Mount Scott railroad?

A. It was operated by the East Side Railway Company.

Q. What kind of cars were used?

A. At that time they used just one coach and an engine.

Q. A steam engine?

A. Yes sir; a steam engine.

Q. That was the Mount Scott dummy, it was called, wasn't it?

A. I do not remember what they called the steam engine.

Q. When it was turned over to the Portland City and Oregon Railroad what change was made, if any?

A. There was a time when they moved everything away from there and stopped operation, then there was some agreement made and they put it back on. I do not remember the time, that was after it changed hands.

Q. They put on the electric cars then, didn't they?

A. Not right away. The electric cars were put on after that.

Q. Do you remember the year they were put on?

A. I could not say.

Q. Wasn't it after the electric cars were put on that the place began to grow?

A. I think so; after the electric cars were put on.

Q. During the old days you speak of when they had a ten cent fare from Portland to Lents it was 5 cents to the city limits—to Mount Tabor.

A. It was 5 cents to the city limits; yes sir.

Q. And then another 5 cents to Lents on the steam road?

A. I think so; yes sir.

Q. As far as you know it always has been a five cent fare out to Mount Tabor Junction from 1st and Alder sts. or Madison st. bridge?

A. I think so.

347 Q. You don't know what the contract was, or the agreement you speak of, when the service was resumed in 1901?

A. No sir; I don't know.

Q. You don't know what the expense was to the people, or what the people paid to get that railroad, do you?

A. No sir; I could not say.

Q. You say that Oak Grove has built up more than Milwaukee during the last few years?

A. I believe so.

Q. More sightly place to live than Milwaukee?

A. Well no; there are certain advantages at Milwaukee which Oak Grove hasn't. Well, Milwaukee has abundant spring water and high land to build on.

Q. You would say Milwaukee was a better place to live than Oak Grove?

A. I would sooner live in Milwaukee than Oak Grove. I live there.

Q. Can land be bought more cheaply than at Oak Grove?

A. I could not say.

Q. The main population of Oak Grove has been people living there and doing business at Portland?

A. I could not say. All I know about Oak Grove is about how much it has built up in the last five or six years. That is about all I know.

Q. Milwaukee is closer to Portland than Oak Grove, isn't it?

A. Yes sir.

Q. It costs 5 cents less to get there from Milwaukee than it does from Oak Grove, doesn't it? On the cars?

A. Yes sir.

Q. Will you kindly tell the court then why it is that, despite the fact that Milwaukee has 10 cent fare to Portland and Oak Grove has 15 cent fare to Portland, Oak Grove has built up more than Milwaukee?

A. I like Milwaukee the best.

348 Q. Then it has not been because of the fare that Oak Grove has built up more than Milwaukee and the building up is due to other causes?

A. It might be they could get land a little cheaper farther out—a little cheaper than at Milwaukee.

Q. You do know, as a matter of fact, that people went past a cheaper point to a higher point in rate of car fare?

A. It seems to me it has built up more in proportion than Milwaukee.

Q. More new houses built in Oak Grove during the last 6 years than in Milwaukee, hasn't there?

A. I think so; yes sir.

Q. More families have taken up their residence in Oak Grove than in Milwaukee at the same time?

A. That is just the same, though it seems to me that Milwaukee has built up a little more lately. I could not say just exactly how much more than Milwaukee Oak Grove has built up but it seems to me that it has.

Q. Now, Mr. Hively, if the lower fare was the principal factor in determining a man as to where he would build his home you would think he would build at Milwaukee rather than Oak Grove, would you not?

A. That depends upon a man's family.

Q. Then it is not altogether the fares that determines a man to build at Oak Grove rather than at Milwaukee?

A. I don't know.

Q. So that when you said a little while ago you considered the

high rate of fare was the cause of these places not build- up you did not consider these other conditions at Milwaukee and Oak Grove? You did not consider the facts; that at Milwaukee and Oak Grove the point which has the lower fare has less people than the
349 more distant point at a higher fare?

A. Well, Milwaukee, you know, is much closer to Portland than Lents.

Q. How much closer is Milwaukee to Portland than Lents?

A. Well I do not know the distance exactly but I should judge at least two miles.

Q. What would you say if I should tell you that Milwaukee is not 2 miles but is less than 1 mile shorter distance than it is from 1st and Alder Sts. to Lents station?

A. Well, of course if you have measured it, it is all right, but I certainly did not think so.

Q. It is 6.71 miles from Milwaukee to 1st and Alder sts. and 7.69 miles from 1st & Alder sts. to Lents.

Mr. GILTNER: Our testimony differs from yours in that respect.

Mr. GRIFFITH: What is the fact, Mr. Hively, as to there being a greater or less number of people residing in that stretch of country on the Mount Scott line between Arleta and Mount Tabor Junction and the number of people residing on the stretch of the Oregon City div. between Milwaukee and the city limits?

A. I don't know as I catch exactly what you mean.

Q. Are there more people living within 2 miles, or a mile and a half rather, of the city limits of Portland on the Mount Scott div. than there are living within the same distance on the Oregon City line?

A. Well, really, I think you take a distance up Hawthorne Ave. the same distance it would be to the Golf Links and I believe it would be about the same. I think it would be but I could not estimate it exactly.

Q. Are there more people living outside of the city limits within a mile and a half of the city of Portland on the Mount Scott div. than there are a mile and a half outside of the city of Port-
350 land on the Oregon City Division?

A. Whereabouts is the city limits on the Mount Scott div.?

Q. On the base line road.

Q. A half mile on either side of the road for a distance of a mile and a half from the city limits out on the Oregon City line, and then take a half a mile on either side of the road for a distance of a mile and a half from the Base Line road out on the Mount Scott div. A mile and a half from the Base Line road would take one past Arleta, and a mile and a half from the Golf Links would take one to Milwaukee Heights.

Mr. GRIFFITH: It would come to a point between Milwaukee and Island Station.

A. Well, what point would it take one to on the Mount Scott line? Tell me that.

Q. It would take in Arleta.

A. Would it take it as far out as Tremont?

Q. Assume that it would take in Arleta.

A. Take as far as say half way between Arleta—say take it to a curve beyond Arleta halfway between Arleta and Tremont. And if it would take it to there there undoubtedly would be more on the Mount Scott line.

Q. And how many times more?

A. It would make it at least a third more. Take it all the way from Annabel to that curve it is all settled up thick, while the only place you would have on the other line would be right at Milwaukee.

Mr. CRAWFORD: Are there any stores at Milwaukee?

A. Yes sir.

Q. Are there any stores at Oak Grove?

A. One I think.

Q. Is there any larger territory tributary to Oak Grove than there is to Milwaukee, people who would come there to trade naturally?

351 A. Well, of course, Milwaukee trade depends mostly upon the village while to Oak Grove the people come in from a little farther in the country. The Milwaukee trade is confined mostly to the village.

Q. Quite a large territory then tributary to Oak Grove—country people?

A. Yes sir; there is more farming community around it.

(Witness excused.)

JAMES REED, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

Examined by Mr. CRAWFORD:

Q. State your name, age, residence and occupation.

A. James Reed, farmer, member of the State Board of Horticulture, age 45.

Q. Where do you reside?

A. Milwaukee.

Q. How long have you resided at Milwaukee?

A. 6 years.

Q. Where were you residing prior to that time?

A. Portland.

Q. Are you well acquainted with the conditions existing around Oak Grove for the last 6 years and with the conditions existing around Milwaukee for the last 6 years?

A. I am.

Q. Are you also acquainted with the conditions existing around Lents for the last 6 years?

A. Yes sir.

Q. You may state what has been the growth of Milwaukee and Oak Grove as to general improvements and population as compared to Lents district, as we call it, during the last 6 years.

A. That is a pretty hard comparison to make. I do not know where to get hold of anything.

Q. From the city limits out to the Lents station, and from the city limits to Oak Grove and the city limits to Milwaukee?

352 A. Six years ago I wanted to buy a farm and I looked at a farm at a place where Stewart now is, I believe, on the Mount Scott line. I could have bought a farm right where Stewart is today, a larger farm than I bought at Milwaukee, and the place I could have bought, at the place where Stewart is now, is almost completely occupied with houses and I do not suppose in that 60 acres I do not suppose there is any one man that owns more than 2 acres or 3 acres.

Q. In the whole distance from Annabel to Lents what has been the general improvement?

A. About the same; about the same general improvement from the city limits.

Q. How has the general improvement been from the city limits—from the Golf Links to Milwaukee on the Oregon City line during that time?

A. We have had a few families move in but not a great many. I know them all.

Q. What has been the general improvement from the city limits to Oak Grove during this same period?

A. Just about the same—very little difference.

Q. And about what is the ratio of increase in population as between the two places?

A. I should say there has been practically in the last 6 years—there has been (I will make a safe estimate) 18 new houses built in Milwaukee and probably that many at Oak Grove against possibly 5000 in the Arleta district—in the Stewart district. That is the comparison.

Q. You may state then whether the population has increased in about like proportion to the buildings?

A. Just about.

Q. You may state what the natural advantages of Milwaukee are as compared with the Lents district?

353 A. We have better water; we have electric lights; we have fairly good streets and we have a better drained country I should judge; lays better and more sightly. The Stewart district is, practically speaking, level and all gravel; where we have the finest soil in the state at Milwaukee.

Q. Where is the Stewart district as you call it?

A. That district is east of Annabel. I don't know the stations outside of Stewart. The station of Stewart is the only town I know of except Lents and Annabel. I don't remember the names of any of the other towns in there. I know Annabel; I know Lents and what I call the Stewart tract, because that is the tract I looked at.

Q. Built up nearly solid along there?

A. Yes sir.

Q. You may state what the natural advantages of Oak Grove are as compared with Lents district.

A. Oak Grove is a nice sightly location there—you can look down the river for miles and the soil is what I would call very good.

Q. And the soil at Milwaukee?
A. Cannot be beaten any place.
Q. And in the Lents division?
A. I don't want it. I would not buy it for a farm.
Q. What in your opinion has caused this great improvement on the Lents Division over Milwaukee and Oak Grove districts?
A. Well, as near as possible the way I get at it is this: I advertised my place for sale. I am not exactly satisfied with existing conditions at Milwaukee. I advertised the place for sale; in fact have had it on the market for 3 years and have had a great many people come to look at it. It is most too large a place for most people. They ask me what the fare is to Portland and when I say 10 cents
354 they shut up like a clam. The most of the people are working people and they want—you understand I mean by working people, plasterers, carpenters and so on—and these people are the people buying homes, and these people want a transfer. They may work in Arleta, St. Johns or some other place, and they may work up on Portland Heights or some other place like that and they want a transfer.
Q. Then what do you give as the controlling cause of the building up of the Lents district so much faster than the Oak Grove and Milwaukee districts?

(Mr. GRIFFITH: The same objection covers all this.)

A. I cannot see anything else but the five cent fare.
Q. Are you acquainted with a little place called Nickum?
A. Yes sir.
Q. That is about a mile from Golf Links?
A. It is an equal distance between Nickum and my place and the O. W. P. waiting room at Milwaukee—an equal distance.
Q. Between Golf Junction and Milwaukee?
A. No, between Nickum and Milwaukee. Nickum and Milwaukee is at the junction of a triangle between my place. I can go from Nickum to my place to *to* Milwaukee waiting room an equal distance.
Q. And also about the same distance to the junction?
A. Just about.
Q. Are you acquainted with that road from Nickum to the Golf Junction?
A. Yes sir.
Q. Have you made any estimate of the amount of dirt in the fill?
A. I did figure it once.
Q. About how much did you make it?
A. I should say there was in the neighborhood of almost 5,000,000 cubic yards. I believe that was the estimate. In the cut.
355 Q. That was in the cut?
A. Yes sir.
Q. Did you make any figures on that cut?
A. That was what I am speaking about. The fill is larger than the cut.
Q. About how many yards of dirt are in the fill then?

A. There is more in the fill than in the cut because they did not have dirt enough out of the cut to make the fill.

Q. How much more did it take?

A. I never figured that.

Q. You would say between the two then about 10,000,000 yards?

A. Pretty nearly.

Q. That is about 5,000,000 removed from the cut and 5,000,000 put in the fill?

A. If I am not mistaken the contractor that started in was to get 15 cents a yeard but he did not finish the job of moving the dirt out of the cut.

Mr. GRIFFITH: Do you know that. State what you know.

COURT: State only what you know.

A. I know he stopped work.

Q. What was it worth to put in dirt per cubic yard for a fill like that?

A. I don't know.

Mr. GRIFFITH: Object to that as he has not shown himself competent to testify.

COURT: Develop his competency.

WITNESS: I have had experience in moving rock.

Q. Do you know the contract price for moving dirt?

A. No sir.

Q. Was there any rock in this?

A. Practically speaking, it was all dirt work and gravel.

Q. You may state as to what it was worth to make that fill.

COURT: He said he did not know.

Mr. GRIFFITH: Was there a contract let?

A. Yes sir.

356 Q. Was the contract in writing?

A. Yes sir.

Mr. GRIFFITH: I now object to the introduction of this testimony as not the best evidence, not only is it collateral but it is hearsay.

COURT: If they insist upon the objection the court will have to sustain it. It is along the same line as that of the other day. The court will sustain the objection and you can take it under the rule if you wish to over the ruling of the court.

(Exception noted and allowed.)

A. The contract price was 15 cents per cubic yard.

COURT: He had stated that before the objection was made.

Mr. CRAWFORD: What occasioned this deep cut and this big fill there?

A. Why to put the Cazadero line there.

Q. Why was it? Was the land higher or did they have to get up on the plain at Milwaukee, or what?

A. They had to strike the Johnson Creek level and in order to do that and get almost a straight roadbed they had to fill across Johnson Creek Bottom—they had to fill that place.

Q. What is the population of Milwaukee?

A. 1500 or 2000 in the school district.
Q. We mean the town of Milwaukee.
A. Probably 600. Something like that.
Q. How about Oak Grove—just the town of Oak Grove?
A. Probably 150.
Mr. GRIFFITH: What do you include in the town of Oak Grove?
A. Oak Grove.
Q. Is there a town there?
A. A village.
Q. Where are the limits of it; is there an incorporated town there?
A. No sir.
Q. Oak Grove is a station on the line?
A. Yes sir.
357 Q. And also the residence of Mr. Paget?
A. I believe so.
Q. That is its chief claim to distinction?
A. I don't know.
Q. Milwaukee is incorporated, is it not?
A. Yes sir.
Q. Census ever been taken there?
A. I don't know.
Q. Do you know the number of votes cast there?
A. No sir. I take that back, I was clerk one year and I believe there were 121 votes cast.
Q. In measuring this cut and fill who measured it? Did you?
A. I estimated it.
Q. Did you have a tape line or other measuring device, or did you just look at it and make an estimate?
A. I walked through the cut and I knew the dimensions of Mr. Scott's place from the corner of the road going to Milwaukee next to the Nickum hill—I knew the number of chains.
Q. How long did you figure the cut to be?
A. About 2000 feet.
Q. How wide is it?
A. It varies; in some places it might go 200 feet.
Q. And other places how narrow?
A. Not much narrower than that.
Q. How deep is it?
A. It would run 70 feet in some places.
Q. How deep is it on an average?
A. On an average it would be 60 feet or somewheres in that neighborhood; between 55 and 60 feet.
Q. How wide is the fill at the base?
A. The fill has washed out in some places. I should say it would run 300 feet; that is where the last dirt dumped went in.
Q. How long is it?
A. That fill is pretty long. It must be anyway—it is over 4000 feet long.
358 Q. Did you ever measure it with a tape line or anything of that kind?
A. No sir.

Q. That is merely a guess?
A. That is an estimate.
Q. Made from what source, from actual measurement?
A. Made from simply walking over it.
Q. How deep is the fill?
A. From where it crosses the Southern Pacific track it must be a good strong 50 feet.
Q. Did you ever measure it?
A. No sir.
Q. Did you ever measure it at any point?
A. No sir; that is simply an estimate.
Q. Is this cut and fill entirely west of Nickum?
A. There is part of the cut that is just the other side of Nickum.
Q. This fill extends westerly and the city boundary line, if you know where that is, crosses the fill, does it not?
A. I am not familiar with the city boundary.
Q. Did you make any actual figures of the contents of the fill and removal of earth from the cut?
A. I did at one time.
Q. Have you those figures now?
A. No sir.
Q. How long ago did you prepare those figures?
A. I made the estimate about a year ago. I gave the figures to the attorney general of the estimate as near as I could remember them.
Q. You walked over the deep fill and through the cut and made an estimate?
A. Yes sir.
Q. With no tape line or other measuring device of any kind you made an estimate?
A. The rails are supposed to show——
Q. Did you count the rails?
A. No sir.
359 Q. Did you know how many rails there were through there at the time?
A. I knew within one or two rails of the number between Milwaukee and the Golf Links.
Q. You have never measured the depth of the fill or cut?
A. I judged that simply from furniture cars going through on the Southern Pacific.
Q. And you never had any experience in making fills of earth?
A. I have had in trestling.
Q. Where?
A. At Grays Harbor Jetty; I was assistant superintendent.
Q. You dumped the earth down in the ocean?
A. Yes sir.
Q. And you could not see it after it got down into the water?
A. Yes sir, we could.
Q. See it after it went into the water?
A. In some places we could.

Q. You are satisfied there was 10 million yards—cubic yards—of fill and cut?

A. Yes sir.

Q. And you base that upon the evidence of your own eye without measuring them at all?

A. I simply said before that it was an estimate.

Q. Is that land out at Lents cheaper than the land at Milwaukee?

A. It was at one time.

Q. At the time you were there?

A. Yes sir.

WITNESS: I could buy land at Milwaukee for $150.00 per acre at that time.

Q. But out at Lents they were booming it and they had a number of real estate agents at work upon it?

A. Yes sir.

Q. And had 5 cent fare at that time?

A. They were just starting in then to build it up.

Q. That was 6 years ago and before you went to Mil-
360 waukee. The 5 cent fare had been in effect for a year then?

A. I do not know how long.

Q. Milwaukee school district has a population 1500 or 2000.

A. Yes sir.

Q. Now do you mean these 18 houses have been built inside the school district or inside the corporate city limits?

A. Inside the city limits.

Q. And how is it at Oak Grove?

A. At Oak Grove proper. I have never—I would have to say about ⅛ of a mile on each side of the line.

Q. Would the area at Oak Grove upon which 18 houses have been built be greater or less than the corporate limits of Milwaukee?

A. It would be less.

Q. Considerably less?

A. No, I do not know as it would be any less. I call Oak Grove from along about Milwaukee Heights clear over to Risley. That is what I call Oak Grove.

Q. And you say there has been 18 houses built there up and for ⅛ of a mile on each side of the line?

A. About that.

Q. Have you ever counted them?

A. No sir.

Q. This is another estimate then, isn't it?

A. Yes sir.

Q. During the last six years the rates of fare to the district which you describe as Oak Grove in which 18 houses have been built has been 15 cents?

A. I think so.

Q. And within the same period within an equal area between the corporate limits of Milwaukee 18 houses have been built the fare was 10 cents?

A. Yes sir; but you must understand that the land is a little bit less at Oak Grove than at Milwaukee; and the people who buy at

Oak Grove are working people except once in a while a
361 banker.

Q. What kind of people buy the land at Milwaukee?

A. Principally people who work in town.

Q. Now at Oak Grove the people work in town, do they not?

A. Very few. There is a few; I believe you had some on the witness stand who went to *town* once or twice a week.

Q. And do you mean to say the people at Milwaukee are people who go back and forth to town every day? Name some of them?

A. I believe there is a man named Springer—he built a house: and Lector, he built a house; and a carpenter (I do not remember his name) a German, he built a house. I am not very well acquainted with them.

Q. You said a little while ago you could name all of them?

A. I can if I have to.

Q. Do so.

A. In the last 6 years there is Springer. And a railroad man moved up in Minthorn—I don't know his name. I do not know the names. And the Lector house. Bergomeyer built a new house. Brandt. By George, I do not believe there are 18 houses which have been built in there. I made an estimate but I do not believe there are 18 moved in there.

Q. So the greater number of people and house building in this district have gone on by and built up there at Oak Grove?

A. Oh, no; that is an estimate.

Q. There are still 18 new houses in the Oak Grove district?

A. I estimate it at that.

Q. And you have named 6 new houses.

A. Yes sir; I could not name the 18 new houses in Oak Grove if I tried to. It is simply an estimate.

Mr. CRAWFORD: You may state whether you have any knowledge of rebate tickets which have been issued by the company
362 since the order of the commission went into effect on March 6th?

A. There was twice I went to town and I asked for a rebate check and did not get them. I know that I have got 12 or 14 of them myself.

Mr. CRAWFORD: What is the highest number that you have knowledge of?

A. I could not make a very good estimate.

Q. Can you tell the number on your last ticket?

A. Yes sir, I believe it is 4638. (Examines slip of paper.) That is correct.

Q. What is the date of that ticket?

A. March 23, 1908.

Q. And was that issued in the morning or evening?

A. That was issued in the morning, I believe.

Q. How often do you travel on the O. W. P. road?

A. Well, practically speaking I travel every day.

Mr. GRIFFITH: You do not know when the ticket now in your hand, No. 4638, was issued to you that meant that 4638 tickets preceded that and had actually been issued?

A. No sir; I do not.
Q. You do not know then how many have actually been issued then, do you?
A. No sir.
Q. All you know is that you happen to hold one numbered 4638?
A. Yes sir.
Q. When did you ask for one and did not get it?
A. We were coming home——
Q. Do you know just what the date was?
A. It was the day after we came back from here for the last trial. I rode home with Miller, the Inspector; he was on the car
363 that morning. I asked the conductor when I gave him my 5 cents and a transfer and asked for a rebate check. He said "We don't give rebate checks on transfer and 5c. fares." He said that was his orders.

Mr. GRIFFITH: That was entirely right and within the order of this court.

Mr. CRAWFORD: That was only a 5c. fare you paid?
A. I gave him a transfer check and 5c. and did not get a rebate.

Mr. GRIFFITH: My only purpose in asking the witness that question was to show your honor that was no violation of the order of the court that had been made. The order of the court was to issue rebate check when the cash fare was paid.
WITNESS: May I ask the attorney a question?
Mr. GRIFFITH: I am not on the stand but go ahead.
WITNESS: The other time I was refused one of these rebate checks, at that time I—the Madison st. bridge was closed and in order to catch my car I had to go to the end of the Madison st. bridge. I tendered the man a transfer and 5c. fare and was refused a rebate check. Now can you tell me how I could help that?

Mr. GRIFFITH: That was only a temporary thing due to the closing of the bridge for repairs, was it not?
A. Yes sir.
WITNESS: Didn't I offer to pay him cash fare and was refused; isn't that a violation of the order of the court?
Mr. GRIFFITH: No sir.

(Witness excused.)

364 PHILLIP STREIB, witness produced on behalf of defendant, after being duly sworn, testified as follows:

Examined by Mr. CRAWFORD:

Q. State your name, age, residence, and occupation.
A. Occupation farmer, residence Milwaukee, age forty-four.
Q. How long have you resided in Milwaukee?
A. I have resided in Milwaukee, proper, since March, 1906.
Q. Where were you residing prior to that time.
A. Portland.
Q. How long did you reside in Portland.

A. I came to Portland in 1881.

Q. Now, you may state whether you have been familiar with the conditions existing around Milwaukee and Oak Grove for the last ten years.

A. I have, yes sir.

Q. And the conditions existing around Lents for the last ten years.

A. Yes sir.

Q. Do you know the natural advantages of each of those places?

A. Yes sir.

Q. And during that same time have you been well acquainted with the natural advantages around Nickum?

A. Yes sir.

Q. And Golf Junction?

A. Yes sir.

Q. Golf Links. Now, you may state whether in your opinion the natural advantages of Oak Grove and Milwaukee are as great as along the Lents division—what we call the Lents division in this suit.

A. The natural advantages of Milwaukee and Oak Grove are certainly superior to those of Lents.

Q. Then you may state, if you know, about what the
365 population and improvements here at the Lents division about eight or ten years ago.

A. Well whatever there is now has been practically—nearly entirely built up with the last eight years.

Q. You may state, if you know what the improvements and population were around Milwaukee and that division about eight or ten years ago.

A. They were very much the same with the exception of a few houses.

Q. How is it at Oak Grove?

A. There have been a few houses built, but not very many.

Q. How does the population and improvements from Annabel to Lents on the Mt. Scott line compare now to what they were eight years ago?

A. Well in that district you might say there is one solid city out there all along the line there—one house built close to the other.

Q. How was it eight years ago.

A. There were none there.

Q. About how many population was along there eight years ago?

A. There might have been one hundred and fifty in all that district out there.

Q. About how many did you say there were now?

A. Of course, I have never counted, but estimating it, I should judge from twelve to fifteen thousand.

Q. How many inhabitants at Milwaukee and vicinity eight years ago?

A. Do you mean the incorporated district of Milwaukee?

Q. Right around in that vicinity—say from the city line up to Milwaukee, including Milwaukee.

366 A. Well, there may be about fifteen hundred people. What you call Milwaukee and the surrounding country.

Q. About eight years ago?

A. Yes sir; There now—there might be two thousand.

Q. And from Oak Grove to the city line, that would be Golf Junction, say eight years ago, about how many inhabitants?

A. In the Oak Grove district there have been some houses built, but not very many. I never counted them, and I could not say exactly how many.

Q. Did you include Oak Grove in with your estimate of Milwaukee?

A. No sir.

Q. Excluding that—just Oak Grove itself, around there, about how many were there eight years ago—not including Milwaukee?

A. Eight years ago—well there might have been one hundred or one hundred and fifty, living around there.

Q. And about how many now?

A. Two hundred or two hundred and fifty.

Q. Now, then, how are the natural advantages as compared with Lents, as to there being water at Oak Grove and Milwaukee?

A. Well, Lents is supplied by a well. In a small district certain parties pump water into a tank and supply water to the neighbors. Other houses dig what you would call a cistern, which is filled in the rainy season. That is about all I know about it.

Q. How is it at Oak Grove?

A. We have spring water there—It is the nicest water I know of. We have the Minthorn Springs, which are well known all over the country.

367 Q. You may state, if you know, what is the cause of the Lents district advancing in population and wealth—advancing so much faster than the Oak Grove and Milwaukee district.

A. Most decidedly the five cent fares.

Q. How has it affected real estate values?

A. Well, real estate values—eight years ago I was out to the Lents country to look at a place before I bought my place in Milwaukee. I could have bought a place out there for $75 an acre, and I went to Milwaukee and bought for $150.00, because of the difference in the land. I wanted a place where I could raise vegetables,—I could not do that out there. But now in going over that line, I see it is high every where. Some times I went out with friends who were looking for real estate, and I saw them selling land out there from $250 to $400 and up, and they have been more than that for some special locations there.

Q. You may state whether you ever had any conversation with Mr. F. I. Fuller?

A. Yes sir.

Q. Superintendent of the plaintiff company, relative to a five cent rate for passengers from Portland to Milwaukee and Portland to Oak Grove, and if so, state when it was and where it was, time and place and who were with you.

A. (Answer relating to conversation had with Mr. Hurlburt stricken from the record by order of the court.)

COURT: If it is connected with the present administration, he can answer, but tell us what you know.

WITNESS: Shall I just tell you what the conversation was with Mr. Fuller?

COURT: Yes sir.

WITNESS: I will state it. The first time I met Mr. Fuller,
368 he explained to us that the company had just taken hold of these O. W. P. lines and he wasn't familiar with all the conditions and circumstances. We told him what we came for—a five cent fare to Milwaukee. Mr. Fuller told us he would have the traffic agent, Mr. Mulchay, look up a schedule on that and see what he could do, and asked us to call again. We came again, and the second meeting we had with Mr. Fuller, Mr. Fuller said he was sorry he had not had time to look this matter over yet—he had not done anything with it, and he asked us to call again. We were quite disappointed. Mr. Schindler mentioned he did not feel that there was any use, but Mr. Fuller immediately stated he did not want us to think so, and he asked us to come again. We came a third time and we placed the matter before Mr. Fuller again, stating all these conditions, that the people could ride to St. John, a distance of over nine miles, and out to Lents, a distance of seven miles, by these lines at five cent fares, and we at Milwaukee at a less distance than the other places have to pay ten cents. Mr. Fuller considered the proposition—he turned around in his chair and studied it. He said I am not going to give you an answer now, but I think you ought to have a five cent fare to Milwaukee.

Q. When was that?

A. Some time last summer. I did not keep any dates or minutes or anything, and he said then—in fact, we made the proposal that Mr. Fuller should give us a five cent fare on the Sellwood local line only, because Mr. Fuller said he could not make any reduction on
the fare to Oregon City, and we proposed that he should give
369 us a five cent fare on the Sellwood local and not upon the Oregon City. He said he would loop up the law and see if he could do it, and we should come again for an answer. We came again about two weeks later. He said, gentlemen this arranging of fares is taken out of my hands. The legislature up here has passed a law to fix these things and they are coming up to look over the line, and he said he would take the committee from the commission the coming week and see what he could do for us, and so we finally went ahead and brought the matter before the commission ourselves.

Mr. GILTNER: What proportion of the employees of the plaintiff company reside at the city of Milwaukee?

A. It is very few.

Q. Where do they reside?

A. They must reside in Sellwood.

Q. Is that within the five cent fare limit for their families?

A. They are obliged to live at Sellwood because it provides a five cent fare for their families.

Q. What, if you know, is the population of the city of Milwaukee proper?

A. In the incorporated limits about 750 inhabitants.

Q. State what the people who work in the city and the school children who go to the city proper have to pay for the purpose of getting to school and to work down town?

A. Some pupils go to the medical college, some to work in department stores—some boys and some girls—and those who go to stores now if they are anywhere off from First and Alder street,
370 they would have to have a transfer; in order to get a transfer they would have to pay one cash fare to Golf Links and one cash fare in, and in order to get to the high school, if they did not have a transfer, they would have to walk about fourteen blocks.

Q. How about the people of St. Johns?

A. Five cent fare.

Q. And the people of Milwaukee have to pay ten cents.

A. They have to pay ten cents.

Q. What has been the effect upon the town of Milwaukee since this five cent fare has been instituted to Lents. At the same time leaving the fare from Portland to Milwaukee ten cents, what has been the effect upon the district around there as to growth?

A. Naturally Lents has grown up to one solid city, while Milwaukee has been standing where it was.

Q. Has been stagnant all the time?

A. Yes sir, it has been stagnant all the time.

Q. Now do I understand the conditions and circumstances, so far as cost of transportation is concerned, is cheaper from Portland to Milwaukee and Oak Grove than from Portland to Lents and Nickum?

A. Of course, I was never on the road, but I should say from the lay of the country, it should be cheaper to run a car to Milwaukee than to run a car to Lents. It is mostly up hill where Milwaukee has mostly a straight line.

Q. And how about Nickum?

A. Be the same, except a high fill the company had to put in at a big cost.

Q. In other respects, the circumstances and conditions between the places were practically the same, aren't they?

A. Yes sir.

Mr. GRIFFITH: Do you think it would be cheaper to run
371 cars from Portland to Milwaukee than from Portland to Lents because there are fewer curves?

A. Well there is less grade to Milwaukee than to Lents.

Q. Do you know that, as a matter of fact?

A. Yes sir.

Q. Have you been over the line to determine?

A. Yes sir. I rode my wheel, and you can find it out that way pretty quick.

Q. Did you ride along the track?

A. I rode as close to it as I could get.

Q. How about the curves, are there more curves?

A. Yes sir.
Q. You are sure of that?
A. Yes sir.
Q. Did you count the number of curves?
A. I did not count, but I know there are more.
Q. You said you were familiar with the natural advantages of Nickum. How many houses are there at Nickum?
A. There are quite a few houses building up around Nickum.
Q. How many?
A. I never counted them.
Q. Well approximately.
A. Well there are five or six building now.
Q. How many are there altogether within the same area as were embraced in what is called Oak Grove?
A. Well that would be about an even proposition I should think.
Q. Are there as many houses at Nickum as at the platted Oak Grove?
A. Yes sir.
Q. You say 250 at Oak Grove?
A. Yes sir.
Q. Were there any people there eight years ago?
A. Yes sir, a few farmers.
372. Q. These 250 people have practically all come into Oak Grove during the last eight years?
A. Yes sir, mostly.
Q. On a fifteen cent fare?
A. On tickets.
Q. How long has the station at Nickum been established?
A. I think about three years?
Q. Are you sure it is not longer than that?
A. It may have been three or four years.
Q. The fare has been five cents there all the time?
A. To my knowledge.
Q. And half a dozen houses there—that is a fact is it?
A. Yes sir, the location of Nickum isn't nearly so attractive as Milwaukee for improvements.
Q. Then it isn't a question altogether of cheapness of transportation that induces people to take up their residence in one community or another?
A. No, not that location.
Q. Then other considerations than transportation enter into consideration in determining a man where he is going to live?
A. That just depends upon what a man wants to do. If a man has boys and girls that work in town, they figure up how much money every month must be paid on these fares.
Q. This fare of five cents has been in force at Nickum during the whole time, and during that whole time there have been six houses built?
A. Yes sir.
Q. And during the same time at Lents 12,000 people have come in?

A. Yes sir.
Q. Why did not they go to Nickum?
A. It isn't as desirable a location.
373 Q. Then it is not entirely a question of fare?
A. It is yes sir.
Q. But you said it wasn't. It is just as cheap to one as to the other, an equal distance. Then it isn't a question of fare entirely, is it?
A. It is, yes sir.
Q. When was it you had this conversation with Mr. Fuller at which you say he told you you ought to have a five cent fare?
A. It was last summer.
Q. The summer of 1907?
A. Yes sir.
Q. That was just before the railroad commission went out on the line?
A. Yes sir.
Q. Who were present?
A. Mr. Schindler, myself, and Mr. Fuller.
Q. Did that conversation take place in Mr. Fuller's office?
A. Yes sir.
Q. Was there anybody else there?
A. No sir.
Q. Do you know of any persons who have taken up their residences along the Mt. Scott car line, outside the city limits of Portland, during the last six years, who would had there been a five cent fare to Milwaukee have taken up their residence at Milwaukee—do you know that of your own knowledge?
A. There is quite a number.
Q. Do you know anybody who would have done so?
A. Yes sir.
Q. Name them.
A. A man by the name of Peterson—he wanted to live in Milwaukee and he said I cannot locate here because my boys work in town.
Q. Did he come to you and talk to you about it?
A. Yes sir.
374 Q. Anybody else?
A. Quite a number, I don't know their names.
Q. Can you give me the number?
A. No sir.
Q. Do you remember one particular man who said that?
A. I knew him—I remember him because I knew him. I forgot the names of the others.
Q. And you don't know any other inducements held out to Mr. Peterson to take up his residence—what land did he buy?
A. A little ways south from Lents.
A. From Lents station?
A. Yes sir.
Q. How far from the car line?
A. About two blocks.

Q. How much did he buy?
A. Three lots.
Q. How much did he pay for them?
A. I don't know.
Q. Did he buy on the installment plan?
A. Yes sir.
Q. As a matter of fact, a number of town plats have been laid out on the Mt. Scott line and the lots have been sold on the installment plan on easy payments at long time, and there have been a number of real estate agents having charge of that. Isn't that true?
A. Yes sir.
Q. Nothing of that kind has ever been done at Milwaukee, has it?
A. There is real estate; plenty.
Q. Plenty of real estate, but do you have men to push it?
A. Yes sir.
Q. But it don't sell?
A. No sir.
Q. How many plats?
A. There are different plats, I don't know just how many, where a person can buy lots on small payments. Mr. Sellwood, for instance, has 160 acres there in six blocks from the car track.
375 Q. Are these platted town sites near Milwaukee right on the car line?
A. Well, they are within easy reach—within a few blocks.
Q. They are not right on the car line?
A. No sir.
Q. The town sites of Mt. Scott reach right up to the car line, don't they?
A. Some of them do.
Q. Why is it the town lots and town plats cannot be laid up against the car line at Milwaukee, between Milwaukee and Milwaukee Heights, for instance?
A. One side of the track is all occupied by houses and by the hotel from the bridge.
Q. From the bridge at the south end of Milwaukee?
A. It is the shingle mill, and there is one party living down there near the river.
Q. What is on the other side of the track?
A. There is a slough there.
Q. As a matter of fact, isn't it quite as convenient to lay out town plats along the car line, or near the car line in your community as has been done at Mt. Scott?
A. Perhaps—not right on it, but I think a couple of blocks.
Q. Because of the difference in the natural conditions?
A. I don't know that it is just an advantage to live right on the car line—I would not myself.
Q. Why did the buildings follow the car line?
A. Some people aren't so particular as I am, and don't realize it.
Q. When you said 250 people at Oak Grove, do you mean the platted town site of Oak Grove?

A. No the whole distance from Courtney to Risley and from Milwaukee Heights to Risley.

376 Q. And for what distance on either side of the track?

A. For half a mile or so.

Q. That would be a stretch of country, then, a mile wide, half a mile on either side of the track, and in that stretch of country there would be 250 people, and not more than that?

A. Yes sir.

Mr. GILTNER: Will you please state the service; how often have they been running cars from Portland to Nickum?

A. There is a car every two hours.

Q. And they have been doing that ever since they have had a five cent fare there?

A. Yes sir.

Q. That would have some effect upon the people locating there wouldn't it?

A. Yes sir.

Q. And another is the fact they would have forty or fifty steps to climb?

A. About three hundred steps—I never counted them, but there are that many.

Q. That would also have an effect—the effect of that would also be to keep the people from buying there?

A. I should think so, I don't know.

Q. Do you mean the court to understand that all the people from the city limits on the Mt. Scott division live right along the car line.

A. Right on the car line, no sir—they live off it.

Q. Isn't it a fact they live, four, five or six blocks and a half of a mile from the car line.

A. Yes sir, over there.

Q. Dwellings located along there?

A. Dwellings located all along there, yes sir.

(Witness excused.)

377 WILLIAM SCHLINDLER, witness on behalf of defendant, after being first duly sworn, testified as follows:

Examination by Mr. GILTNER:

Q. What is your name?

A. Mr. Schindler.

Q. Where do you reside?

A. Milwaukee.

Q. What position do you occupy in the city of Milwaukee?

A. Mayor.

Q. How long have you lived at Milwaukee?

A. About twenty-nine years.

Q. Do you know the district known as the district of Milwaukee and Oak Grove on the Oregon City division?

A. Yes sir.

Q. Do you know—how long have you known the conditions and circumstances of those places up there?

A. Oak Grove?
Q. Oak Grove and Milwaukee.
A. Twenty-nine years.
Q. Do you know a place and district known as the Lents district from Annabel station on out to Lents station?
A. I have been over that road.
Q. How long have you known that country?
A. The first time I was out there was about ten years ago.
Q. Do you remember—you have been over the Mt. Scott Line?
A. From Lents in, yes sir.
Q. Do you know what the condition of that country was prior to the time they inaugurated a five cent fare from Portland to Lents? The number of people—the population out there?
A. It was hardly anything—they were a few houses—mostly gravel and brush.

378 Q. What is the condition of that country now as to people and population and houses?
A. Why, it is pretty nearly one city all the way in.
Q. From where?
A. From Lents.
Q. What is the condition of the town of Milwaukee today and also Oak Grove, as compared to what it was seven years ago—say seven or eight years ago?
A. Well, conditions have not improved as they should do.
Q. Do you know the conditions and circumstances around Nickum also and St. Johns?
A. I never was at St. Johns.
Q. You know about Nickum, do you?
A. Yes sir.
Q. State what has been the proportion of Oak Grove and Milwaukee as compared to the growth of that district known as Lents and from Annabel Station out to Lents station in the past seven years?
A. Oh, well I don't think more than about 8% compared to Annabel.
Q. What do you mean by that?
A. They have ten houses where we have one.
Q. What is the population out there now?
A. I don't know, I think about ten or twelve thousand.
Q. What is the population of this district of Milwaukee and Oak Grove at this time.
A. Talking of the school district?
Q. Yes sir.
A. Well, I think the two, about 2,500.
Q. What is the population of the town of Milwaukee proper?
A. Between seven and eight hundred.

379 Q. What has been the cause of this abnormal growth of this Lents district, if you know?
A. The fare I suppose.
Q. What is it you attribute it to—what is the cause of the growth of that district?
A. On account of the fare, cheap fare.

Q. What is the cause of the stagnation of the growth in the town of Milwaukee and Oak Grove during this period?

A. Well the fare—the ten cent fare.

Q. What effect, if any, has this difference in the cost of transportation or fare had upon the towns of Milwaukee and Oak Grove in the past seven or eight years?

A. Well, it amounts to a good deal, the way the people look at it. If you have two or three going from it, it soon counts up.

Q. What do you mean?

A. People going down to school—girls going down there to learn a trade. The first six months they get nothing at all, and have to pay their car fare besides.

Q. That would have a tendency to keep people from settling there?

A. Why, I have often heard them say we cannot pay the ten cent fare, and they would have to go where they would get a five cent fare.

Q. Have you as mayor been called upon by people during your term of office about the fares?

A. Yes sir.

Q. What reason did they have for not buying there or settling there—what reason did they give for not settling there?

(Objection, Overruled, Exception noted and allowed.)

A. Well, the first reason was the fare. They would like
380 to go down to Milwaukee to live, but they go down to Sellwood on that account. They say they would sooner live in Milwaukee, but on account of the transportation for their families, it would be a kind of a hardship on them.

Mr. GRIFFITH: If the court please, I would like to have that all stricken out as being incompetent and immaterial.

(Overruled. Exception noted and allowed.)

Mr. GILTNER: What is the relative proportion of the travel on the Oregon City and Sellwood division between Milwaukee and the city of Portland?

A. You mean the difference between them?

Q. What proportion goes on the Sellwood line from Milwaukee to Portland and on the Oregon City line?

A. Well, I think more travel on the Sellwood line than on the Oregon City line. Of course, when an Oregon City car comes along, the people get on that, because they make so much quicker time to Portland.

Q. Do you know a man by the name of Tom Sellwood?

A. Yes sir.

Q. And whether he has any land for sale in the town of Milwaukee?

A. He has laid out one hundred acres there.

Q. What has he done in the way of selling lots up there, and what are his terms up there, and has he been able to sell any?

A. He sold a few, and he is putting them off on $5 installments.

Q. How long has that been platted?
A. About a year.
Q. You know how many he has sold.
A. I think about fifteen or twenty out of six hundred.
Q. Fifteen or twenty out of six hundred in a year?
381 A. Yes sir.
Q. Isn't it a fact that it has been platted more than a year?
A. Well it might be a little over a year, but it has only been regraded about a year.

Mr. GRIFFITH: Just a bit leading that was all.
Mr. GILTNER: I believe, Your Honor, this testimony is all accumulative and I don't think I will ask him any more questions.

Mr. GRIFFITH: Do you think the increase in population at Milwaukee and the new houses put up at Milwaukee—about 8% of the houses put up on the Mt. Scott line from Annabel out to Lents, during the last seven years?
A. Approximately, not to exceed that.
Q. If it were 10%, you would have eighteen new houses at Milwaukee during the last seven years.
A. More than that about twenty-one.
Q. Then, you would have about 210 put up on the Lents line during the same time?
A. No, more than that.
Q. How many more than that?
A. Well, there may be a thousand.
Q. You have been out there?
A. Was out there about six months ago.
Q. When was the last time before that?
A. About eight or nine years ago.
Q. You were there several years before the five cent fare went into effect, and then not there again until last March?
A. That would make it fourteen years—seven years from now and about six months ago was the last time.
Q. Were the steam cars running out there then?
382 A. I went out there with a horse and wagon.
Q. Do you know whether they were running out there the next to the last time you were there?
A. Yes sir.
Q. And then you did not see the town of Lents on the Lents line until quite recently?
A. Yes sir.
Q. You don't know, then, what the condition of the line and the number of people along the line at the time this five cent fare went into effect do you?
A. Hardly anything.
Q. You don't know, because you weren't there?
A. Seven years ago, I wasn't there.
Q. You say the steam cars were running there the time before you were there last?
A. I think they were running then—seven years ago.

Q. How many people, Mr. Schindler, ever came to Milwaukee for the purpose of buying or came to Milwaukee and have told you they would not buy at Milwaukee on account of the ten cent fare, or seven cent fare on the books?

A. A good many.

Q. Where did they go?

A. Some stayed where they were, some bought other places, a great many bought at Sellwood. Henry Wessenger bought at Sellwood. A man came over the other day, he did the buying on that account.

Q. How nearly did you come to selling some land in Milwaukee, were they satisfied with the price?

A. Yes sir.

Q. Did they tell you so?

A. Yes sir.

Q. Do you own the land?

A. Have been selling some.

Q. Did you own the land when they wanted to buy?

383 A. Wessinger and a man in Sellwood, a carpenter, who bought some lots, bought a lots at Milwaukee and he was going to build on it, and he said if the ten cent fare keeps in effect, he would not want to build there, and he built at Sellwood.

Q. Did he pick out a lot in Milwaukee he wanted to buy?

A. He has a lot there now.

Q. And has a lot at Sellwood?

A. He lives at Sellwood, but prefers to live at Milwaukee.

Q. He has told you that, has he?

A. Yes sir.

Q. Do you know of any other specific instance of that kind?

A. A man was there Friday or Saturday, and he is coming back tomorrow; he likes the location, and if the five cent fare goes into effect, he wants to buy.

Q. How many people ever wanted to buy and decided not to do so because of the ten cent fare charged and have gone over to Nickum on account of the five cent fare?

A. I don't know that they ever did.

Q. Pretty close to Nickum?

A. About a mile and a half.

Q. With the fare question down to five cents?

A. Yes sir, and a good many steps to climb.

Q. How many blocks are there in Milwaukee along the car line running through.

A. Up to the first bridge you mean?

Q. Yes sir.

A. Three blocks deep.

Q. And that is all.

A. Yes sir.

Q. At how many places in Milwaukee do passengers get

384 on and off the cars?

A. Two places.

Q. Where are they?

A. Jefferson street and car barns.

Q. Where do they get on and off on the Sellwood line?

A. At the car barn.

Q. Have you any record of the passengers who have travelled back and forth on the Sellwood line?

A. No sir.

Q. You don't know how many of your passengers do that, do you?

A. No sir.

Q. How long has the Sellwood line been in operation to Milwaukee?

A. Between two and three years.

Q. Why was that put in operation?

A. I don't know—I expect the travel demanded it.

Q. Did you ask for it?

A. No sir.

Q. Did any of the officials of Milwaukee ask for it?

A. I don't know.

Q. Was there at that time—at the time they commenced to operate that car any greater business on the railroad from Milwaukee and to Milwaukee than there is now?

A. Some more business.

Q. What more business?

A. The Club.

Q. The Milwaukee Club was then in operation?

A. Yes sir.

Q. And the passenger business in Milwaukee created by the business of this club was the inducement for keeping this car in operation?

A. I don't know.

Q. What effect, if any, had the continuous operation of the club upon the travel on the cars from and to Milwaukee?

A. I don't know.

385 Q. Have you observed the amount of travel from Milwaukee on the cars?

A. I don't travel very often on the cars myself—maybe once a week.

Q. You don't use the cars yourself.

A. Not very often.

Q. And you don't observe the number of passengers who get off and on?

A. Not unless I am around there. I sometimes see the cars come in, and from three to half a dozen passengers.

Q. You must get between four and five hundred passengers a day then. You have never counted them, however?

A. No sir.

Q. What price does Mr. Sellwood put on his lots?

A. Well, I don't know. I think from $125 to $150 and upwards.

Q. How far from the car line?

A. About six blocks.

Q. How do they lie—level?

A. Rolling.
Q. Any streets out to them?
A. Not improved streets.
Q. All unimproved streets?
A. Yes sir.
Q. How do they compare with the town plats as laid out along the Mt. Scott line as to accessibility to the car line?
A. Better location.
Q. You think Milwaukee has a better location and better natural advantages than any of the places along there, don't you?
A. That is what I think.
Q. Why did they sell near Oak Grove more than they have at Milwaukee in the last six years, if Milwaukee is so much more desirable?
386 A. I expect it is because the land is cheaper.
Q. They pay more fare, don't they?
A. One cent more.
Q. Pay five cents more on cash fare?
A. They pay five cents more on cash fares, but on tickets one cent more.
Q. The people of Milwaukee use the tickets, don't they?
A. A great many do.
Q. And the people of Oak Grove use the tickets, don't they?
A. Yes sir.
Q. Isn't it a fact that the greater majority of the people in those two communities travel upon the commutation tickets of the company?
A. I don't know.

(Witness excused.)

F. I. FULLER recalled in rebuttal.

Re-examined by Mr. GRIFFITH:

Q. You heard the testimony of Mr. James Reed that in the cut between Nickum and Golf Junction on the Cazadero line, not less than five million cubic yards of earth had been moved and that in the fill and stretch of track from Nickum to Golf Junction, not less than five million cubic yards of earth had been placed, and also that the contract price for moving and filling, that is, for making the fill, was 15 cents per cubic yard. Will you tell the court what the cost of that fill and cut would be, based upon the estimate of five million in the cut and five million in the fill?
387 A. If the testimony was ten million cubic yards in the fill at fifteen cents per cubic yard, it would cost a million and a half dollars to make the fill.
Q. And the cut?
A. And the cut.

Mr. GILTNER: That means both?
COURT: The court understood the witness there to say at least ten million cubic yards in both cut and fill together.

WITNESS: The moving of ten million *years,* required for the work, as I understand it, would cost a million and a half dollars.

Mr. GRIFFITH: And your total estimate of reproducing the 95.53 miles is a trifle less than $300,000?

A. Yes sir, that is a very conservative estimate.

Q. According to the testimony of the witness Reed, the road bed of one mile of the 95.53 miles of road would cost one million and a half of dollars, is that right?

A. As I understand it.

Q. Would that fill and cut cost anything like one million and a half dollars?

A. That is utterly impossible.

Q. And you, with your knowledge of the cut and fill at that point, estimate the cost of making the cut and fill at how much?

A. I can only make a rough estimate of the proposition, not having any measurements to cover it. Do you want me to say any thing about that?

Q. Yes sir.

A. Of course, I can only give a rough estimate, but just judging from the size of the fill and comparing it with other fills, I should say that ten million yards was, at least, ten times too much—
388 about ten to one. I do not think it would amount to even that.

Q. What is the fact, Mr. Fuller, about the conversation which the witness Streib testified to having had with you, and in which the witness said you told him that you believed Milwaukee should have a five cent rate to Portland?

A. I have no recollection of ever making such a statement. In fact, during my whole conversation, on account of their having made a statement that they had been promised or made some promises of a five cent fare, I intended as far as possible to be sure to give them no promise at all. And after Mr. Streib's statement, I do not doubt that they understood me that way, but it must have been I made some statement with reference to that, or it seemed to them so, because I do not believe that myself, and I was exceedingly careful to make no promises on that account.

Q. State to the court the reasons for operating a car on the Sellwood division to Milwaukee.

(Objected to as direct examination. Overruled. Exception noted and allowed.)

A. At the time our company purchased the road that car was in operation. Some time during the year 1907, the Milwaukee Club was closed out. The club, which was located perhaps one thousand feet this side of the town of Milwaukee——

Q. This side?

A. I mean between Milwaukee and Portland—a thousand feet nearer Portland than Milwaukee itself—when the club closed down, the sale of tickets fell off very materially, and we immediately investigated the matter to see if that car was necessary. In order to

do this, I had some of our inspectors—some employees count the number of people on the Sellwood cars which passed the
389 Golf Links and when they returned. They said the number was very small.

(Objected to as hearsay evidence. Overruled. Exception noted and allowed.)

—we decided to stop running the cars to Milwaukee and for that purpose decreased the number of cars from five to four, running them only to Golf Links or Junction, as it is called. We found these four cars operating on a fifteen minute schedule, which was the time allowed on the branches, could not make the time. The four cars could not give the service under the franchise As a result, we had to put on five cars. This gave the cars a long lay over out there. In order not to have them lay over so long, we had them run up to Milwaukee to take what they could get.

Q. That was also giving Milwaukee fifteen minute service?

A. That was also giving Milwaukee fifteen minute service.

Mr. GILTNER: How many times did they come to see you in regard to the five cent fare?

A. I would not say, Mr. Giltner. Mr. Streib testified to four times, and I suppose that is true.

Q. When he first came to see you, I think it was, Mr. Streib said you told him to come again, and the next time he came to see you, you told him that you had not had time to take it up, and the next time he came to see you, you heard what he testified to?

A. With the exception of this conversation, of which I have no recollection, and the impression conveyed, which I understand was that I was to take the matter up with the railroad commission.

Q. No, not with the railroad commissioners, but with your people.

390 A. I understood that I was to take the matter up with the railroad commissioners, but I represented to him that the railroad commissioners had indicated their intentions of going over the line.

Q. He came four times?

A. Yes, with Mr. Schindler.

Q. You told him to come again?

A. Yes sir.

Q. If you did not intend or did not have it in your mind to give these people, or investigate the proposition of giving them a five cent fare, why did you fool these people back to see you three or four times.

A. Because I did intend to investigate the matter.

Q. Didn't you say in the testimony you did not intend to give them a five cent fare?

A. I said——

Q. They came to see you three or four times and you insisted upon them coming back?

A. I think three times.

Q. And you never intended to give it to them?

A. I said I never was in favor of it.
Q. Did you ever talk it over with anybody?
A. Yes sir.
Q. Whom?
A. Mr. Mulchay.
Q. Mr. Mulchay did not have authority to grant it.
A. The first time they came in I had no knowledge of the circumstances.
Q. Mr. Mulchay never had any authority to give a five cent fare at all?
A. No sir.
Q. You would naturally go to Mr. Josselyn—he is the man?
A. No sir.
391 Q. He is the man over you.
A. He wasn't there at that time.
Q. Mr. Mulchay is the only man you took it up with?
A. When the committee first called I wasn't familiar with the commutation books and commutation rates along the line. There are a great many of them, and there are other things, I had to attend to, and had not gone over the whole matter, and at the time they called first I could not give them any answer—it was impossible for me to do it, and I asked them to come back, the same as I would ask you or anybody else.

(Witness excused.)

Mr. GRIFFITH: Now Mr. Aitchison, you can make your motion regarding that map.
Mr. AITCHISON: We ask leave to submit to opposing counsel, to the court, a chart showing what the relation of rates on the Oregon City and Cazadero lines and the Mt. Scott line would be, and also the commutation rates.
COURT: Does this take the place of anything?
Mr. GRIFFITH: Not to take the place of anything we have offered in evidence. I have no doubt that Mr. Aitchison will make it up correctly.
Mr. AITCHISON: I will offer it in evidence. (Marked P. R. L. Company Exhibit A.)

WILLIAM SCHINDLER recalled in rebuttal.

Examined by Mr. GILTNER:

Q. You were present when Mr. Streib called on Mr. Fuller in regard to the five cent fare?
A. Yes sir.
Q. State what he said in regard to whether the people of
392 Milwaukee ought to have a five cent fare, or not.
A. When we got there, I told him, the others before him, Mr. Hurlburt, Mr. Goode, and Mr. Reed—Mr. Fuller said, I think you ought to have a five cent fare.
Mr. CRAWFORD: You told Mr. Fuller that Mr. Hurlburt, Mr.

Goode, and Mr. Reed had each told you that you ought to have a five cent fare?

A. Yes sir.

Q. And Mr. Goode was at the time president of the company?

A. Yes sir.

Q. And then Mr. Fuller told you that if Mr. Goode said that he thought you ought to have it, he thought so too?

A. Mr. Fuller said that he thought we ought to have it.

Q. That is your recollection?

A. Yes sir.

Q. Are you positive he said that?

A. Yes sir.

Mr. GRIFFITH: That is merely a difference of opinion.

Mr. CRAWFORD: I guess that is all of it, and we wish to move the court that this case be referred to the commission for further examination by the commission, for the reason that further testimony was introduced upon the trial below.

COURT: There was some testimony taken up to which there was an exception. The court passed upon all, I believe, of the rulings. I don't remember any testimony that court wishes to eliminate upon either side. Take all the testimony and act upon it.

Mr. GRIFFITH: I would ask that an order be now made that a transcript of the evidence be made and transcribed and transmitted to the commission, and returned to the court within fifteen days.

It is ordered, that the testimony taken at this meeting be
393 extended and that such testimony, together with all exhibits, be transmitted to the Railroad Commission of Oregon for such action as prescribed by law, and that further proceedings, in this case, be stayed until the return of the Railroad Commission, to be made within fifteen days from the date of such transmission of such testimony and exhibits.

Whereupon, at the hour of 3:30 p. m., court stood adjourned until the — day of April, 1908, at the hour of — in the —.

394 STATE OF OREGON,
County of Marion, ss:

I, F. Roy Davis, the duly appointed official stenographer, do hereby certify that the foregoing is a full, true and correct transcript in longhand of all the testimony, evidence and proceedings had on the above entitled investigation before the Circuit Court of the State of Oregon in the Third Judicial District, Department No. 2, carefully compiled by me from my original notes thereof taken down by me, and I hereby certify the foregoing to be a correct statement of all the evidence and proceedings had on said investigation as taken and transcribed by me.

Witness my hand officially this 28th day of March, 1908.

F. ROY DAVIS,
Stenographer.

NOTE.—When the words "Objection", "Exception" appear in the transcript it shall mean that "Objection is taken; exception is taken and allowed."

F. ROY DAVIS,
Stenographer.

395 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, Appellant,
v.
RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from the Circuit Court for Marion County.

Hon. William Galloway, Judge.

Argued and submitted November 23, 1909.
Frederick V. Holman and Franklin T. Griffith, for Appellant.
A. M. Crawford and R. R. Giltner, for Respondent.
Moore, C. J.
Affirmed.

(Endorsed:) Filed Dec. 21, 1909. J. C. Moreland, Clerk.

396 This is a suit to set aside an order made by the defendant, the Railroad Commission of Oregon, requiring the plaintiff, the Portland Railway, Light and Power Company, a corporation, to reduce in some particulars a schedule of fare, and also to deliver, to persons paying the diminished charge, transfer tickets granting further conveyance on other cars under its management. The facts are as follows:

The plaintiff controls and operates cars propelled by electricity on urban, suburban and interurban railways. Thus; the Oregon City division extends from the intersection of First and Alder streets in the City of Portland, easterly across the Willamette River, thence southerly through Golf Junction, Milwaukee and other places to Canemah; the Mt. Scott division continues east from a junction with the Oregon City division to Mt. Tabor Junction, and thence southerly through Lents to Lents Junction; the Sellwood branch extends south from a junction with the Mt. Scott division to Golf Junction; and the Springwater division extends east from Golf Junction through Nickum, Lents Junction and other places, and thence southerly to Cazadero. A part of the Mt. Scott division, 3.50 miles in length and lying outside the limits of Portland, was granted to the plaintiff subject to a contract made with its predecessors April 30, 1901, stipulating that for a term of ten years from that date, the fare per passenger from Lents and intermediate points to and through the City of Portland should never exceed 5 cents, and providing that if the covenant were broken, the property so conveyed should revert to the grantor. As the inhabitants of Portland exceed 50,000, not more than 5 cents can be demanded for carrying any person on a

street railway line for a continuous trip in one general direction between any two points in the city. B. & C. Comp. sec. 2096; Laws Or. 1907, chap. 53, sec. 11. The plaintiff has faithfully per-
397 formed the terms and conditions of the contract mentioned and, when requested, has issued to all passengers on the Mt. Scott division, boarding its cars within the limits specified, transfer tickets entitling them to further transportation over lines of railway controlled by it in Portland, though the trackage distance from Lents to the intersection of First and Alder streets by way of this division is 7.69. The distance from such terminus by way of the Oregon City division to Milwaukee is 6.71 miles, of which trackage 1.35 miles is outside the city boundary. The fare to and from Milwaukee to Portland is 10 cents, and no transfers over the lines controlled by the plaintiff in the latter city are granted to passengers over such division.

The municipality of Milwaukee, by its mayor, filed with the Railroad Commission a complaint asserting that the fare for carrying passengers, as last indicated, was unjustly discriminatory against that town. Upon investigation, pursuant to notice, the commission stated the facts in substance, as hereinbefore detailed; determined by an original and a supplemental finding that the 10 cent fare specified was subject to the charge interposed; and made an order requiring the plaintiff to desist from demanding or collecting more than 5 cents of any individual for such transportation in either direction, and also to deliver to such passengers the same transfer privileges that were accorded to persons traveling between Lents and Portland.

This suit, being at issue, was tried, and from the testimony taken the court made findings of fact conformable to those framed by the Railroad Commission, to the effect that the plaintiff's observance of the terms of the contract referred to had substantially increased the value of lands in the town of Lents and its vicinity and
398 had also materially augmented the population thereof, while in consequence of the discrimination the town of Milwaukee had remained practically unchanged, stating the particulars as to each place; that the fares on the Oregon City division, when measured with the charges on other lines, were not unreasonable, but when compared with similar exactions for transportation on the Springwater and the Mt. Scott divisions, were unjust, unreasonable and discriminatory; and having approved the order of the Railroad Commission, the plaintiff appeals.

MOORE, *C. J.*:

It is maintained by plaintiff's counsel that the law in force when the order was confirmed did not authorize a regulation of fares in consequence of discrimination against any locality, but only when a difference in charges was made to passengers for like and contemporaneous service, and such being the case, an error was committed in rendering the decree herein.

A statute was enacted February 18, 1907, creating a Railroad

Commission and containing provisions which, so far as deemed material, are as follows:

"The term 'railroad' as used herein shall mean and embrace all corporations * * * that now, or may hereafter, own, operate by * * * electric * * * power, manage or control, any * * * interurban railroad * * * as a common carrier in this State." Laws Or. 1907, chap. 53, sec. 11.

"Upon complaint of any * * * municipal organization, that any of the * * * fares, * * * are in any respect unreasonable or unjustly discriminatory, * * * the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given the commission may proceed to investigate the same. * * * If upon such investigation the * * * fares, * * * complained of shall be
399 found to be unreasonable or unjustly discriminatory, * * * the commission shall have power to fix and order substituted therefor such * * * fares, * * * as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future." Id. sec. 28.

"Whenever, upon an investigation made under the provisions of this Act, the commission shall find any existing * * * fares, * * * are unreasonable or unjustly discriminatory, * * * it shall determine and by order fix a reasonable * * * fare * * * to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory." Id. sec. 30.

"It shall be unlawful for any railroad to demand, charge, collect or receive from any person, firm or corporation a less compensation for * * * any service rendered or to be rendered by said railroad, in consideration of said person, firm or corporation furnishing any part of the facilities incident thereto." Id. sec. 48.

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination." Id. sec. 49.

"The provisions of this Act shall be liberally construed with a view to the public welfare, efficient transportation facilities, and substantial justice between * * * passengers and railroads." Id. sec. 59.

"The duties and liabilities of the railroads defined in Section 11 of this Act, shall be the same as are prescribed by the common law, and the remedies against them the same, except where other-
400 wise provided by the constitution or statutes of this State, and the provisions of this Act are cumulative thereto." Id. sec. 61.

After the decree herein was rendered a statute was enacted making the provisions of the Railroad Commission law applicable to any locality. Laws Or. 1909, chap. 97.

It might seem that the latter law was a legislative interpretation

that the original act did not interdict the collection of fares that were unreasonable or unjustly discriminatory as to a locality. "The enactments of any specific provisions on a particular subject," says a text writer, "are not to be regarded as conclusive declarations that the law was different before." End. Int. Stat. sec. 374. At common law, as the carrier deals with individuals, they alone can prefer charges for a wrongful discrimination. Beale and Wyman, R. R. Rate Reg. sec. 831. These authors, at the section noted, say: "Except under a statute, a city or locality or the citizens in general cannot complain of the rates charged by a carrier."

The rules which derive their authority from the judgments and decrees of courts, recognizing and enforcing the usages and customs of immemorial antiquity, having, by section 61 of the Railroad Commission Act, been made expressly applicable to the regulation of railroads in Oregon, do the principles of the common law afford a remedy for the correction of charges made by a common carrier where they are in any respect unjustly discriminatory as to a locality, when the original law under consideration (sec. 28) authorizes a complaint thereof to be made by a municipal organization?

The doctrine has been asserted that by the ancient law a carrier of chattels for any person, though he was obliged to trans-
401 port, for a reasonable consideration, all proper goods in the order in which they were received, and that when the charge exacted therefor did not exceed the measure indicated, he could legally transport similar goods for others over the same line and distance for a less sum, which discrimination was held not to be unjust, because the less favored shipper, who was obliged to pay the higher freight charges, had only liquidated the legal demand. 17 Am. & Eng. Ency. Law (2d Ed.) 135; Story Bail. sec. 508*a*; Wood's Ry. Law, sec. 197.

It was subsequently ascertained that the application of such a principle permitted the patronized consignors to undersell their business rivals to the extent of the discrimination in freight rates, thereby destroying the competition of others and building up monopolies for themselves, to prevent which laws were enacted, evidencing a growing popular sentiment against the doctrine first promulgated. In the absence of such legislation, however, the courts of last resort, when not committed by an opinion to the contrary, have held that the carrier's charges should not only be reasonable, but should also be equal as to all persons who might be affected thereby. Beale and Wyman, R. R. Rate Reg. sec. 741; Messenger v. Pennsylvania R. R. Co., 13 Am. Rep. 457; Same case 18 Am. Rep. 754. A text writer, referring to this principle, observes: "The English courts have said that at common law common carriers were bound to make reasonable but not equal charges, and that one of whom a fair compensation was exacted had no cause of complaint because another obtained a similar service for less. It is doubtful if this really was the common law of England; certainly it never was that of the United States. It is the settled American doctrine that as common carrier- exercise a public employment, they owe equal

duties to all, and must make no unjust or injurious dis-
402 crimination between different individuals in their rates of toll." Bald Am. R. R. Law. Chap. 35, sec. 1.

Chapter 53 of the Laws of 1907 was enacted to prevent dicrimination, and in order to make the statute effective the act expressly declares that its provisions shall be liberally construed with a view to the public welfare and the promotion of substantial justice between passengers and railroads. The axiom; "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect," though generally applied to the transfer of real property, is also adapted to the construction of acts of the legislature. Broom Legal Max. (7th Eng. Ed.) 359; End. Stat. Const. sec. 418. As the original statute enlarged the common law right by permitting a municipal organization to make complaint of unjust discrimination, the act imports that the accusation sanctioned may be invoked to call attention to favoritism as against a locality over which the officers of the municipality have control, and the language so employed necessarily implies that the Railroad Commission, though not in explicit terms, is, by reasonable intendment, directed to hear and determine the charges, and empowered to grant the requisite relief. Giving to the original act the enlarged interpretation which is expressly demanded, we conclude that the statute of 1909 (chap. 97) making the Railroad Commission law applicable to a locality, was adopted out of an abundance of caution and to remove all doubt in relation thereto, but that the amendment was a matter of supererogation, for plenary power to correct discrimination as to localities was impliedly granted by the original act, and hence the orders undertaken to be set aside are not void for want of jurisdiction.

It is contended that the 5 cent fare on the Mt. Scott
403 division from Lents and intermediate stations to and through the City of Portland was established pursuant to a valid contract entered into by plaintiff's predecessor for a valuable consideration, six years prior to the passage of the Railroad Commission law; that by virtue of such agreement the plaintiff secured a vested right of which it cannot be deprived; and that the attempt to do so, as manifested by section 48 of the Railroad Commission Act, is an effort on the part of the legislative assembly to violate the obligation of a contract.

The organic law of the state, in force when the Lents contract was executed, contained a clause as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." Const. Or. Art. 11, sec. 2.

Another provision of the fundamental law is invoked, towit:

"No * * * law impairing the obligations of contracts, shall ever be passed." Id. Art. 1, sec. 21.

In Ex parte Koehler, 23 Fed. 529, in construing the foregoing clause, interdicting the deterioration or extinction of any established privilege of a corporation, it was held that a railway company

formed under the general corporation act of Oregon has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature could not impair or destroy. The reasonable compensation thus guaranteed to a common carrier is a standard which necessarily fluctuates, so that a rate which would, when adopted, have
404 been deemed justifiable, may not thereafter be so regarded owing to the increased traffic and the improved facilities whereby the cost of transportation is lessened. The authority of a railroad company to collect reasonable fares and charges, though a vested right, is like all other interests subject to the police power of the state, which may be exercised to promote the public welfare and to establish, between the common carrier and the passenger or the shipper rules calculated to prevent conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a like enjoyment of rights by others. Cool. Const. Lim. (6th Ed.) 704. Thus in Bullard *v.* Northern Pac. R. R. Company, 10 Mont. 168, it was held that under the provisions of the Interstate Commerce Law, (24 U. S. Stat. 379) a contract, made prior to the passage thereof (Feb. 4, 1887) for the transportation of freight at a rate and on terms violative of that law, could not be enforced against the carrier, to recover rebates due upon goods carried after such act went into effect.

A grant by the legislative assembly to a corporation of authority to employ the right of eminent domain, necessarily implies a reservation of the police power to regulate and prescribe the measure of compensation which is determined to be reasonable and which may be collected for transportation of passengers and freight, and if a common carrier could, by a contract stipulating the continuance of a specified rate of fares and freight for a given time, prevent any interference with such agreement, by invoking the clauses of the organic act relied upon herein, it would thereby become superior to the legislature, which doctrine will never be acknowledged by courts. The police power, being necessary to the preservation of the rights of the citizens and to the maintenance of the autonomy and the authority of the state, cannot be bargained away in
405 any manner whatever. Cool. Const. Lim. (6th Ed.) 340. A contract of the kind supposed will be assumed to be valid until abrogated by the sovereign which prescribes different rates.

It is doubtful if the question here adverted to is involved, for neither the order of the Railroad Commissioners nor the decree confirming it attempts to change in any manner the terms of the agreement relating to the transportation of passengers from Lents over the Mt. Scott division to or through the City of Portland. The contract rate of 5 cents, however, was taken as the basis of a reasonable compensation by which to measure the fare to be charged on the Oregon City division for an equal distance and for conceding the same transfer privileges that are granted on the Mt. Scott division. The terms of the Lents contract probably prevent the plaintiff from charging as great a rate of fare on that division as is now collected on other lines operated by it outside the city limits,

and the only way in which it can escape a violation of the provisions of section 48 of the Railroad Commission law is by reducing the charges on such other lines to the same proportion as is received on the Mt. Scott division. In this particular only can it be said that the obligation of a contract is in any way affected by this act of the legislature. No vested corporate rights have been diminished or destroyed thereby.

It is insisted that the cost of constructing the Mt. Scott division was 50 per cent less per mile than that of the Oregon City division; that the number of passengers on the latter line, north of Milwaukee, is less than one-twentieth of those over the Mt. Scott division; and that the service performed is so dissimilar and rendered under such diverse circumstances and conditions as to make the difference in fares between Lents and Portland and between that city
406 and Milwaukee not unjustly discriminatory against the latter town.

In the vicinity of the Mt. Scott division is a district between the city boundary and the town of Lents which contains many people, and based on this fact it is argued that the Lents contract, in effect, makes such territory a part of Portland and extends to the inhabitants of that locality the 5 cent fare; that considering the question of unjust discrimination, the comparison of fares must be a relative estimate of the respective distances from the city boundary; and that for all practical purposes the remoteness from the Portland terminal should be computed as if all such district were within the corporate limits of that city.

The 5 cent rate of transportation for a continuous trip in one direction between any two points extends by compulsion to the boundary of Portland, (B. & C. Comp. sec. 2096) where the second district of rates begins, unless the first division is voluntarily continued beyond that circuit. As fares outside that city on suburban lines of railway now consist of multiples of 5 cents, all 10 cent rates would be expected to begin at the point of intersection of the line of the road and the city boundary, from which place the extent of the second district should be computed. By making the limits of the municipality the beginning of all 10 cent fares, no discrimination against any locality can exist, except such as the peculiar form of the boundary may sanction; and the several districts, coinciding with the respective multiples of 5 cents, ought to be parallel with the exterior boundaries, if the railway lines were built at right angles thereto. The density of the population along the Mt. Scott division, between the city limits and the town of Lents, does
407 not make that territory a part of Portland, nor can the Lents contract, in effect, incorporate such district within that city.

Section 48 of the Railroad Commission law makes it an offense for any railroad company to collect for carrying one person more than it demands from another "for a like and contemporaneous service". Though the clause of our statute from which the last quoted excerpt is taken does not contain the expression, "under substantially similar circumstances and conditions," as is found in section 2 of the Interstate Commerce Law, it is asserted by counsel for

plaintiff that such phrase is reasonably implied in our enactment, in construing which it should be held that there can be no "like service" unless it is for carriage over the same line, and hence any difference in charges for transporting persons over another branch of the plaintiff's road is not prohibited or unjustly discriminatory.

The legislative assembly of this state in framing section 48 of the Railroad Commission law patterned it somewhat after section 2 of the Interstate Commerce Law, and it would seem that the phrase, "under substantially similar circumstances and conditions," had been purposely omitted from our enactment. This act of congress was designed to correct unjust discriminations in charges for the transportation of passengers and freight from one state or territory to another, while our law is applicable only within the state of Oregon. The great trans-continental railways of our country necessarily cross the Rocky Mountains, from the summit of which freight can be hauled in cars down grade to the Pacific coast or to the Atlantic ocean much cheaper than goods can be transported from points on the respective seaboards to the utmost height of such mountains. The general movement of freight on such lines
408 of railway may only be in one direction, and loaded cars which were hauled to their destinations would be returned empty unless goods for transportation could be obtained, to secure which less charges are frequently made than the cost of the service will warrant. So, too, at some seasons of the year shipments of freight may change their course, and the charges for transportation must be altered to meet the varying conditions and to avoid the necessity of returning cars empty. These facts were undoubtedly considered in framing section 2 of the Interstate Commerce Law, and induced the insertion therein of the phrases, "a like and contemporaneous service" and "under substantially similar circumstances and conditions", the latter of which seems purposely to have been omitted from our law on the subject.

The absence of such clause from our statute leads to the conclusion that the phrase, "like and contemporaneous service", as employed therein, is not limited to transportation over the same line, but extends to service rendered on other lines operated by the same railway company, and particularly so when electric cars are used on urban, suburban or interurban railroads.

The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system.

Quite an array of figures are set forth in the brief of plaintiff's counsel and facts are stated therein in support of the contention that the rate of transportation and the privileges prescribed in
409 the order and decree complained of will not furnish a reasonable return upon the capital invested, and that the maintenance of the existing fares is necessary to supply such recompense; that neither the defendant nor the court can speculate as to

the probable effect upon the plaintiff's business or upon the consequences of any change in the population or in the value of property in the affected district; and that if any reduction is proper an arbitrary diminution of 50 per cent as to Milwaukee is excessive, unjust and unreasonable.

We do not think it necessary to discuss either of these questions, for the plaintiff having agreed to accept a fare of 5 cents for carrying passengers between Portland and Lents thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division an equal distance beyond the boundaries of the City of Portland. As illustrating this principle it is said in Menacho v. Ward, 27 Fed. 529, 532: "The estimate placed by a party upon the value of his own services of (or) property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public."

It will be remembered that the rate to Lents was established pursuant to the terms of an agreement, but it appears that the plaintiff voluntarily made a 5 cent fare on the Springwater division from Portland to Nickum, which latter place is .56 miles outside the city limits, and thereby manifested a preference for Nickum as against Milwaukee, which is 1.35 miles outside such boundary. The reason assigned in the brief of plaintiff's counsel for such discrimination is that where the Springwater division crosses the city
410 limits the road bed consists of a high fill that extends east quite a distance to a deep cut, which latter continues beyond Nickum; that at the boundary, no public highway exists by which passengers can approach the railroad; that the nearest place where the railway can be reached without trespassing on private land is at Nickum; and that in consequence of such obstacles the cars cannot be stopped at the city limits.

A passenger would be entitled to ride on this division from Portland to the city boundary for a 5 cent fare, and if he refused to pay a greater sum for further transportation he could be ejected from the cars at that place. Whether or not he could leave the track without going up or down it to some station where a public highway could be found is a question that affects the plaintiff only to the extent that the absence of such road or street might have a tendency to diminish travel, to overcome which and to promote the interests of the railway company passengers are carried to Nickum. This, in our opinion, under the present statute, amounts to a discrimination. The 10 cent fare between Portland and Milwaukee is not unreasonable when compared with the charges made by other railway companies for similar service, but the Railroad Commission law authorizes an investigation upon a complaint as to a charge which is in any respect "unreasonable or unjustly discriminatory." Sec. 28. It is not necessary, therefore, that the rate charged should be unreasonable, for if it is unjustly discriminatory it is sufficient to authorize a regulation thereof.

An examination of the evidence fully justifies the finding made by the trial court in confirming the order of the Railroad Commission,
411 that the rate from Portland to Lents and from such city to Nickum, and the transfer privilege granted to passengers on the Mt. Scott and the Springwater divisions are unjustly discriminatory as against Milwaukee.

It follows from these considerations that the decree herein should be affirmed, and it is so ordered.

412 Case No. 6967, Drawer No. 652.

Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 4th day of October, 1909.

Whereupon on this Tuesday, the 21st day of December, 1909, the same being the 27th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland, Clerk,

when the following proceedings were had:

PORTLAND RAILWAY LIGHT & POWER COMPANY, a Corporation, Appellant,
v.
RAILROAD COMMISSION OF OREGON, Respondent.

(Milwaukee Case.) Appeal from Marion County.

This cause having, on the 23d day of November, 1909, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence in this cause, and then reserved for further consideration. And the court, having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds there is not error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court, having considered the findings of fact and conclusions of law made by the court below in this cause, finds that the findings of fact are correct and are sustained by the evidence, and that the conclusions of law are correctly deduced therefrom. It is further ordered that said findings of fact and conclusions of law be, and they are, adopted and found as the findings of fact and conclusions of law in this court.

413 And the court, having examined the decree of the court below, finds that it correctly adjudicates the rights of the parties hereto. It is now ordered, adjudged and decreed by

this court that the decree of the court below in this cause rendered and entered be adopted, found and decreed to be the decree of this court in this cause.

And the said appellant, having given an undertaking on appeal, and also as a stay, with the American Surety Company of New York as its surety, it is further ordered that the respondent recover off and from the appellant and its said surety its costs and disbursements in the court below taxed at $98.00, and its costs and disbursements in this court taxed at $—; and also such sum as damages which may be found against the appellant in the court below in this cause under the terms of its said undertaking.

And it is further ordered by the court that this cause be remanded to the court below from which this appeal was taken with directions to enter a decree in accordance herewith, and to ascertain what damages, if any, have been suffered by the respondent and enter a judgment against the appellant and its said surety for such sum.

414 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

RAILROAD COMMISSION OF OREGON, Respondent.

Milwaukee and Oak Grove Case.

Petition for Rehearing.

Comes now the appellant in the above entitled causes and respectfully applies to the court for a rehearing in each of said causes and appellant says that the court erred in rendering its decision herein, in the following particulars:

I.

That the court erred in holding that discriminations between localities was a question within the jurisdiction of the respondent at the time of the hearing of this cause before the respondent.

II.

The court erred in holding that the only way in which the appellant can escape a violation of the provisions of Section 48 of the Railroad Commission Act is by reducing the charges on such other lines to the same proportion as is received on the Mount Scott division.

III.

The court erred in declining to consider the dissimilar circumstances and conditions surrounding the traffic on appellant's Mount Scott division and Cazadero division as compared with the conditions of traffic on appellant's Oregon City division between Portland and Milwaukee.

IV.

The court erred in holding that relative mileage from the corporate limits of the City of Portland to different points on the different lines of appellant's railway was the only point necessary for the respondent to consider in determining the question of unjust discrimination.

V.

The court erred in refusing to hold that the dissimilar circumstances and conditions surrounding the traffic on appellant's railways on its Mount Scott division and Cazadero division as
415 compared with its Oregon City division between Portland and Milwaukee were sufficient to justify a lower rate of fare between Portland and Lents on the Mount Scott division and between Portland and Nickum on the Cazadero division than between Portland and Milwaukee on the Oregon City division.

VI.

The court erred in construing Section 48 of the Railroad Commission Act, being Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said Section 48 as being limited to a consideration of relative mileage from the corporate limits of the City of Portland to different points on different lines of appellant's railway outside the corporate limits of said City of Portland.

VII.

The court erred in affirming the decrees of the Circuit Court and the orders of the Commission for the reason that the Railroad Commission Act, being Chapter 53 of the General Laws of Oregon for the year 1907, violates the provisions of Section 1 of the 14th Amendment of the Constitution of the United States in that said law deprives this appellant of its property without due process of law and denies this appellant the equal protection of the laws.

VIII.

That the order of the respondent in this cause made under and pursuant to the provisions of the said Chapter 53 of the General Laws of Oregon for the year 1907 is in conflict with Section 1 of the 14th Amendment of the Constitution of the United States in that the enforcement of the said order of respondent would deprive this appellant of its property without due process of law and would deny this appellant the equal protection of the laws.

IX.

The court erred in refusing to hold that the rates of fare fixed by the order of the respondent in this cause would be confiscatory in that appellant is required thereby to transport passengers between the

corporate limits of the City of Portland and the town of Mil-
416 waukee without any compensation for such service and also in refusing to hold that the establishment of said fares would deprive appellant of a reasonable or any net profit or return upon its investment in its said railways.

X.

The court erred in affirming the decree of the lower court and the order of the respondent requiring appellant to issue transfers for transportation on lines of railway of Portland Railway Company, it being shown that Portland Railway Company was not a party to the hearing before the respondent and that appellant had no right to issue transfers to lines of said Portland Railway Company without its consent.

417 A corporation is a person within the meaning of the 14th Amendment which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, and forbids the taking of property without due process of law.

Santa Clara Co. v. S. P. Co. 118 U. S. 394.
Minneapolis & St. L. R. Co. v. Herrick 127 U. S. 210.
Missouri P. R. Co. v. Mackey 127 U. S. 205.
Gulf Coast & S. F. R. Co. v. Ellis 165 U. S. 150.
Covington & L. Turnpike Co. v. Sanford 164 U. S. 578.

The fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws.

Reagan v. Farmers' L. & T. Co. 154 U. S. 362.
St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649.

A corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.

Smyth v. Ames 169 U. S. 466.

The 14th Amendment to the Federal Constitution requires that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liability imposed, and no greater burdens should be laid upon one than are laid upon others in the same calling and condition.

Hayes v. Mo. 120 U. S. 68.
Barbier v. Connolly 113 U. S. 27.

An ordinance granting to a street railway company the right to charge a fare of 5 cents during the term of the franchise constitutes a contract that may not be impaired by subsequent legislation either by the state or city.

Cleveland v. Cleveland City R. Co. 194 U. S. 517.
Detroit v. Detroit Citizens' R. Co. 184 U. S. 368.
Minneapolis v. Minneapolis R. Co. 30 Supreme Court Reporter 118.

The establishment of the rates by the railroad Commission was the exercise of a legislative function which denied to appellant due process of law in violation of the 14th Amendment to the Constitution of the United States.

Prentiss v. Atlantic Coast Line Ry. Co. 211 U. S. 210.

418 *The Railroad Commission Act, the orders of the Commission and the decisions of the Court are in violation of section 1 of article XIV of the Constitution of the United States prohibiting any state from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.*

In its decision in this case the court has followed the Circuit Court in finding that the 10 cent fare between Portland and Milwaukee is not in itself unreasonable. From our reading of the decision of the court we assume that if this appellant were operating only its Oregon City division that the order of the Commission holding that the 10 cent rate of fare is unreasonable would be reversed and that it would be held that a 10 cent fare is a reasonable amount to be charged for such service. This fact we contend has been conclusively established in this case. The Supreme Court holds, however, that notwithstanding the reasonableness of the charge of a 10 cent fare to Milwaukee that as the appellant is the owner and operator of other lines of railway serving other and widely separated communities outside of the corporate limits of the City of Portland for a lower fare than that charged between Portland and Milwaukee, that such lower fares to said other communities on said other lines of railway constitute an unjust discrimination against Milwaukee and, under the law, authorizes the Commission to order a reduction in the Milwaukee fare to correspond with the fare charged to any other community on any lines of appellant's railways located an equal distance from the corporate limits of the City of Portland.

In determining the question of unjust discrimination, the court has held in effect, that only the circumstances of relative mileage from the corporate limits of the City of Portland need be considered by the Commission. If such be the effect of the Railroad Commission Act, then we submit that such provision of the law is repugnant to the 14th Amendment of the Constitution of the United States insuring to all persons the equal protection of the laws.

Appellant has invested its money, has constructed its railways and is engaged in operating them as a common carrier and de-
419 pending upon the law to permit it to receive a reasonable compensation for the services rendered by it to the public. The equal protection of the law comprehends that the appellant shall be permitted to enjoy a reasonable compensation for the services rendered by it to the public and it can be deprived of this right to a reasonable compensation only as a consequence of its wrongful act depriving it of its right to invoke the protection of the organic law.

The legislature of the state is without power to enact any law that

will in its operation deny any person the equal protection of the laws or authorize the taking of the property of any person without due process of law. Under the construction of the Railroad Commission Act by this court the appellant is required to operate its railway and provide its service to the public travelling thereon at an admitted loss without having been shown to be guilty of a wrongful act which would operate to deprive it of its constitutional right to equal protection.

It was said by the Supreme Court of the United States in the case of Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362-410,

"The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain."

The decision of the court is in effect that at the time of trial Lents was 3.50 miles outside of the corporate limits of the City of Portland and that appellant having established a 5 cent fare between Portland and Lents should be held to a limit of 5 cents for the transportation of passengers on any other lines of its railway extending 3.50 miles, or less, beyond the corporate limits of the city. If the Railroad Commission Act had contained an express provision to this effect, we apprehend that such provision could not be enforced if it were shown that the carriage of passengers to points 3½ miles beyond the city boundaries in any direction for a fare of 5 cents was impossible of performance by reason of the cost of such service in most of such instances being greater than the rate allowed by law.

Under the construction of the Railroad Commission Act by this court, this appellant is deprived of the right to construct and operate any lines of railway outside of the corporate limits of the
420 City of Portland a distance of 3.50 miles, or less, except upon condition that this appellant shall establish upon such lines a uniform fare of 5 cents. Such rule, however, under the decision of this court, would not apply to any other railway company constructing or operating such lines of railway from points within to points without the corporate limits of the City of Portland, and would leave such other railway companies free to charge a reasonable compensation for the services to be rendered by them. This is the logical effect of the rule announced by this court limiting the consideration of the respondent to relative mileage and operates to deny to this appellant the equal right with others to reasonable compensation for its services.

We are of the opinion that the court has erred in its construction of the Railroad Commission Act in holding that the dissimilar circumstances and conditions surrounding the traffic to the several points need not and should not be considered in determining the question of unjust discrimination.

Adopting that liberal construction of the Act to which the court refers and assuming that the Commission has power to adjust any and all unjust discriminations, we believe the Commission should be required to consider, and the court should give due weight to all of the circumstances and conditions surrounding the traffic to the different points in controversy in arriving at a conclusion as to the

kind of discrimination being practiced, i. e., whether such discrimination is just or unjust.

Section 59 of the Railroad Commission Act provides:

"The provisions of this act shall be liberally construed with a view to the public wellfare, efficient transportation facilities, and substantial justice between shippers and passengers and railroads."

Section 59 of the act does not mean that its provisions shall be liberally construed on behalf of the passengers and shippers only and shall be restricted in its construction when applied to the railroads, but means that the liberal construction shall be applied for the benefit of all interested parties, including railroads, to the end that substantial justice may be obtained.

Notwithstanding the provisions of Section 59, quoted by
421 this court as authorizing the consideration of discriminations between localities which was not expressly conferred by the terms of the act, the court has seen fit to apply a limited and restricted construction to the term "like and contemporaneous service" so as to deprive the appellant of due consideration of all of those circumstances and conditions naturally and usually entering into the making of rates. Thus, the court has refused to consider as justifying any difference in fares between Lents and Nickum on the one hand and Milwaukee on the other, the points raised in appellant's brief and established by the evidence in this case as follows:

I.

That the cost of constructing the Mount Scott division was fifty per cent less per mile than the cost of constructing that portion of the Oregon City division between Milwaukee and 1st and Alder Streets, thereby rendering a smaller investment necessary to handle the traffic on the Mount Scott division than on the Oregon City division.

II.

That on the Mount Scott division the line runs through a thickly settled portion of the City of Portland for 56 blocks and cares for local business within the city limits, while on the Oregon City division there is no local business worth mentioning upon the 5.36 miles of the Oregon City division from Golf Links to 1st and Alder Streets.

III.

That the Mount Scott division is practically a city line having all the advantages of short riders and that a great majority of the passengers on the Mount Scott division do not actually ride more than one-half of the entire distance possible to ride thereon for 5 cents, while on the Oregon City division ninety to ninety-five per cent of all passengers between Portland and Milwaukee ride the entire distance between the terminal at 1st and Alder Streets and the town of Milwaukee.

IV.

That a very small portion of the traffic on the Mount Scott division arises at the distance limit of the 5 cent fare and that
422 ninety per cent of the traffic on the Mount Scott division originates at points nearer the said terminal at 1st and Alder Streets than the 5 cent limit at Lents, while on the Oregon City division practically no traffic arises at any point nearer than Milwaukee to said terminal at 1st and Alder Streets, and that outward bound travel on said Oregon City division is practically all to and beyond Milwaukee.

V.

That the volume of travel on the Oregon City division between Milwaukee and all points North of Milwaukee is less than one-twentieth of the number of passengers carried by appellant upon its Mount Scott division.

This court has held that the phrase "like and contemporaneous service" as employed in the Railroad Commission Act, is not limited to transportation over the same line, but extends to service rendered on other lines operated by the same railway company, and particularly so when electric cars are used on urban, suburban, or interurban railroads. Should we admit that the phrase "like and contemporaneous service" as employed in the Railroad Commission Act bears the construction quoted, yet such construction does not carry with it necessarily the further meaning that the one question of relative mileage shall be considered in determining whether the discrimination is just or unjust.

We have cited in our brief many authorities holding that a preference to one community as against another, if such preference is not unreasonable, cannot constitute an unjust discrimination. Whether the preference or advantage is reasonable or not is a question of fact which should be considered in determining whether such preference constitutes unjust discrimination, and in determining the question of fact as to the reasonableness or unreasonableness of the preference, all of the facts and circumstances should be considered.

A failure or refusal to consider all of the dissimilar circumstances and conditions which may render a preference in one instance reasonable and in another unreasonable, deprives the appellant of the right to have determined the character of its act alleged to
423 be wrongful and without the establishment of such act as wrongful, it cannot be deprived of equal protection of the laws.

In deciding this case this court says further:

"The cost of constructing and maintaining a portion of a railway and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based upon particular divisions of the road but the entire system."

We agree that "the net revenue upon which dividends are declared is not based upon particular divisions of the road but upon

the entire system." It does not follow from this that the rates of fare per mile must be or should be the same on each branch of the railroad. The system of railways under consideration in this case is not made up of a number of links running between two termini, but is made up of different branches extending from a common termini like the extended fingers of a hand and each branch reaching a different terminus, running through a different kind of territory, each branch differing in cost of construction, of maintenance and of operation, and each branch having distinct characteristics as to density of traffic thereon. Under such circumstances, can it be said that the rates of fare should be the same upon each of the several branches regardless of the differing conditions? With such a rule it would not be possible to induce capital to construct railways to different points outside of the corporate limits of Portland requiring transportation facilities except under most favorable circumstances.

It is admitted in this case that the appellant is entitled, under the provisions of Section 2096 of Bellinger's and Cotton's Code of Oregon, to a charge of 5 cents per passenger for a single fare in one general direction within the corporate limits of the City of Portland. By the provisions of the order of the respondent in this cause, appellant is required to transport passengers from the city boundary of Portland to the town of Milwaukee, a distance of 1.35 miles, without any additional compensation to that to which it is entitled under said Section 2096. Having been authorized by general law to charge 5 cents to the city boundary, we submit that the
424 order of the Commission requiring appellant to continue such transportation to Milwaukee without additional compensation is void as in conflict with the express provisions of said Section 2096. It can hardly be necessary to submit authorities to the court in addition to those cited in our brief to establish that it is beyond the power of the Commission to require appellant to perform such service without any compensation. To compel the appellant to use its property and to provide transportation for the public over portions of its line without any compensation whatever constitutes a taking of property without due process of law. Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362.

To give any effect to the orders of the Commission it must be assumed that the Commission is acting in a legislative capacity in the fixing of rates, but the powers of the Commission do not extend to the carriage of passengers solely within the corporate limits of Portland. For the carriage of passengers within the corporate limits of Portland the legislature has heretofore provided that the appellant may charge and collect a single fare of 5 cents. The legislature having by general law authorized a fare of 5 cents within the corporate limits of Portland, such fare is prima facie reasonable. Neither the legislature nor the Commission have by general law or rule established 5 cents as the charge to be permitted railway corporations for carrying passengers any particular distance. Such a law or rule might conceivably be made and be held valid unless it could be shown that the enforcement thereof would result in depriv-

ing railway companies of reasonable compensation, as defined by the law, for their services. Such a law or rule, however, to be valid would necessarily have to apply to all railway companies. The Commission in this case has made a rule extending the 5 cent fare to a point beyond that fixed by general law and applicable only to a particular point. The rule is not general in its application to all railway companies and in itself constitutes a discrimination against this appellant which is in violation of the Federal Constitution insuring the equal protection of the laws.

Giving to the order of the Commission in this case the
425 force and effect of an act of the legislature it would seem to give to the people of Milwaukee the right to compel the appellant to transport passengers between the city limits of Portland and the town of Milwaukee without compensation, and to that extent take the property of appellant without due process of law. Lakeshore and M. S. R. Co. v. Smith, 173 U. S. 684-691.

The fact that the appellant has voluntarily established a fare of 5 cents between Lents and Portland for considerations appealing to it as justifying such rate, furnishes no criterion as to the reasonableness of the rate between Portland and Milwaukee.

The Supreme Court of the United States in the case of Lakeshore & M. S. R. Co. v. Smith, 173 U. S. page 697 said:

"What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

The provision insuring to all persons the equal protection of the laws is violated by any statute or act of a commission acting for the legislature which does not make the rule uniformly applicable to all persons under similar circumstances and conditions. Tinsley v. Anderson, 171 U. S., 101-106.

And it is said that the order of the Commission in this case, acting for the legislature, is uniformly applicable to all railway companies engaged in a common business. Could the Commission, regardless of the reasonableness of the rate, compel a railway company, other than the appellant, operating a single line of railway between Portland and Milwaukee, to charge a fare of 5 cents only because such fare of 5 cents might be established on the line of another railway between Portland and Lents? Would not the line of such other company between Portland and Milwaukee be entitled to charge a reasonable rate for its services between said two points
based upon the cost and value of the service regardless of
426 what rates might be possible to other points equally distant from the City of Portland but running through a populous

territory and furnishing a volume of business justifying a lower rate?

We have been unable to find any decisions of the courts, except under statutes providing maximum rates, where rates of fare upon branch lines of railroad are required to be uniform with rates of fare upon main lines operating under entirely different conditions. In the record of this case two instances have been brought to the attention of the court where in practical operation a branch line of the Southern Pacific Company, known as the Corvallis and Eastern Railway, is operating on a tariff of 4 cents per mile while its main line rate is but 3 cents per mile, and in the case of the Astoria and Columbia River Railroad where its Seaside division is operating under a mileage rate considerably higher than the rate per mile used upon its main line. These higher rates upon the branch lines are justified only upon the theory and by reason of the fact that the cost of the service thereon and the revenue derived therefrom is essentially different from conditions on the main lines.

The Rates Established by the Commission are Confiscatory.

The record discloses that for the year 1907 the net earnings from operation of appellant's railroad, amounted to $153,826.09, and that the fixed charges, interest on $3,000,000.00, representing the actual cost of appellant's railroad, amounted to $180,000.00, leaving a deficit of more than $26,000.00 to which should be added a reasonable amount for depreciation of the railroad and equipment, and it has been shown that the depreciation of electrical railway equipment is very considerable.

It is claimed by the respondent that the effect of the enforcement of the reduced rates of fare to Milwaukee and the Oak Grove group of stations, would reduce appellant's earnings by not more than $7500.00 per annum, but in this computation the respondent has wholly disregarded the effect of said reduced fares upon the great bulk of traffic on appellant's Oregon City division. The
427 court will remember that Milwaukee and the Oak Grove group of stations are along the line of railway extending from Portland to Oregon City and known as the Oregon City division. The volume of travel between Portland and Milwaukee and between Portland and Oak Grove is insignificant when compared with traffic of the entire division. Under the present system of fares on the Oregon City division, the appellant charges a cash fare of 25 cents, which fare is made up of five 5 cent zones between 1st and Alder Streets in Portland, and Oregon City. The Oak Grove group of stations is in the 15 cent zone and the fare from the Oak Grove group Southerly to Oregon City is but 10 cents. It would naturally follow that if the orders of the Commission should be placed in effect, that appellant would be required to reduce its fare 5 cents on all business of the Oregon City division either arising within the territory directly affected by the orders of the Commission, or arising in the territory South of the Oak Grove group of stations. Passengers boarding our cars at Oregon City, for instance, would be permitted to pay a fare of 10 cents to the station of Risley and then,

by virtue of the order of the Commission, pay an additional 10 cents from Risley in to the Portland terminal.

The record discloses that during the year 1907 there were carried on the Oregon City division approximately 800,000 passengers paying a fare of 10 cents or more. As we have shown that the reduction in fare required by the orders of the Commission would affect all of this business, it is apparent that the loss upon the Oregon City division, based upon the 1907 capacity business, would be upwards of $40,000.00, which loss should be added to the deficit above mentioned.

The court has said that the net revenue from the entire system of railways is the fund from which dividends are paid. It is conceded that appellant should be permitted a reasonable net earning upon its invested capital and it has been shown beyond any question that not only is the appellant unable to make any net earning under present conditions, but that by the enforcement of these orders of the Commission, its annual deficit would be greatly increased and the date upon which dividends might be declared from net revenue
428 postponed until such a time that only our posterity could have any interest in it.

The Commission Cannot Adjust Discriminations Between Localities.

We are unable to agree with the conclusion of the court that the Railroad Commission Act of 1907 by general terms confers upon the respondent the power to adjust discriminations as between localities. We respectfully suggest a further consideration of this question. The common law provided no remedy for discriminations as between localities if the charge for transportation to each locality affected was reasonable for the service performed. At common law the people of one locality paying a reasonable charge for the service rendered to them, could not be heard to complain on the ground that some other locality was receiving a similar service for a less compensation; the theory being that the carrier had the right to make a reasonable charge for every service rendered by it, and the carrier had the right to make concessions to some localities, provided the higher charge to other localities was reasonable for the service actually performed.

That at common law one locality has no right to complain of the charges of a carrier on the ground that some other locality was favored by the carrier with a lower rate, see

Enc. of Law, Second Edition, Vol. 17, page 135.
I. C. C. v. Baltimore R. R. Co., 145 U. S. 263.
Beale and Wyman Ry. Rate Regulation, Sec. 831.

The common law exists in the State of Oregon except where abrogated by statute.

In order, therefore, to give the Railroad Commission the power to adjust discriminations as between localities, we take it that there must be authority conferred by the legislature by express enactment or by necessary implication.

Section 28 of the Railroad Commission Act is apparently relied upon as the basis for the authority of the Commission to consider and adjust discriminations as between localities. This Section provides:

429 "Upon complaint of any * * * municipal organization, that any of the * * * fares * * * are in any respect unreasonable or unjustly discriminatory, * * * the Commission may notify the railroad complained of that complaint has been made, and ten (10) days after such notice has been given, the Railroad Commission may proceed to investigate the same. * * * If, upon such investigation, the * * * fares, * * * complained of shall be found to be unreasonable or unjustly discriminatory, * * *, the Commission shall have power to fix and order substituted therefor such * * * fares, * * **as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future."

It will be noticed that the provisions of Section 28 do not in anywise attempt to define what shall be considered unjust discrimination of which any such municipal organization may complain. It is true that Section 28 says, that any municipal organization may complain if any of the fares are in any respect unreasonable or unjustly discriminatory, and if there was in the Act no definition whatever of what might be considered unreasonable fares or unjustly discriminatory fares, it might possibly be contended that Section 28, read in conjunction with Section 59 enjoining a liberal construction of the Act, would be broad enough to include charges of discrimination of any nature cognizable at common law. But even so, it would not be possible for the Commission to consider discriminations as between localities in view of the fact that at common law such discriminations between localities were unknown where the charges were in other respects reasonable. Section 28 of the Railroad Commission Act does not, we contend, change the common law rule because it does not expressly authorize the adjustment of discriminations between localities, nor is the power to adjust discrimination between localities necessary to give effect to the provisions of Section 28. If, therefore, Section 28 does not expressly, or by necessary implication, confer power to adjust discriminations between localities, the liberal construction of the Act, provided for in Section 59, cannot be held to add to the power expressly conferred or necessarily implied. Where a power is not granted or necessarily implied by the provisions of the Act, a further provision of the Act requiring a liberal construction of its provisions, cannot be used as the basis for extending the provisions of the Act and the powers conferred by it beyond that which the legislature has conferred. An express provision requires no liberal construc-

430 tion. If there is no ambiguity in the terms of the Act, there is no need for liberal construction. If the power to act is claimed by necessary implication, then the implied powers may be given to the Act by a liberal construction of its provisions, but even in such case the powers claimed to be implied must be necessary for the full operation of the Act. And if we are correct in our de-

ductions, it was not necessary to give full force to the Railroad Commission Act or to Section 28 thereof that the power to adjust discriminations between localities be considered as given by implication.

It is a familiar rule that all of the provisions of an act of the legislature must be construed together and we have in Sections 48 and 49 of the Railroad Commission Act an express definition of what shall constitute unjust discrimination. Section 48 provides that unjust discrimination shall consist of charging or receiving from any person, firm or corporation, greater or less compensation for any service rendered or to be rendered by the railroad for the transportation of persons or property or for any service in connection therewith, than the railroad charges or receives from any other person, firm or corporation for a like and contemporaneous service. And Section 49 provides:

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation, or particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination."

The language of Sections 48 and 49 exclude from consideration discriminations between localities, first, for the reason that "localities" are not expressly mentioned, and, second, because the discrimination must relate to a "like and contemporaneous service" and must affect a particular person, firm or corporation.

We contend that the right of municipal organization to complain of unjust discrimination must be confined to the kinds of discrimination expressly referred to in Sections 48 and 49.

In our brief we have referred at some length to the im-
431 portance of the word "locality" in the Interstate Commerce Act as giving power to the Interstate Commerce Commission to adjust discrimination between localities, and the effect of the omission of the word "localities" from the Oregon Act, and we earnestly ask that the court again consider the arguments and authorities in our brief upon this point.

The power of the Commission should be limited to the adjustment of rates outside the corporate limits of Portland.

The respondent has undertaken by its order in this case, to prescribe a rate of fare for the carriage of passengers from a point within the city of Portland to a point without the city of Portland, and four-fifths of the distance between the terminal in Portland and the town of Milwaukee is within the corporate limits of the city of Portland. The present charter of the city of Portland was enacted by the legislative assembly at the session of 1903, and paragraph 71 of Section 73 thereof grants to the council of the city of Portland the power "to prescribe rates to be charged for the transportation for the passengers or property within the limits of the city by means of vehicles of every description" and Section 112 of the said charter of the city of Portland provides:

"Every grant of a franchise which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges, which the grantee his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the Council reserve the right to thereafter from time to time charge, alter, regulate and fix fares, rates or charges which the grantee his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise."

These provisions of the Act incorporating the city of Portland authorize the city to prescribe the rates within the city limits upon the plaintiff's railways although the plaintiff may be operating an interurban railroad from other cities, towns or villages within the state.

Section 11 of the Railroad Commission Act of 1907 provides:

"This Act shall not apply to the transportation of passengers being carried solely within the limits of cities by street and other Railways."

432 If the provisions of the Railroad Commission Act of 1907 be construed to mean that the Railroad Commission may establish rates for transportation partly within and partly without the city of Portland, then it would appear that so much of the Railroad Commission Act as authorizes the Commission to establish fares for transportation within the city limits of Portland is in direct conflict with the provisions of the charter of the city of Portland.

Section 2 of Article 11 of the Constitution of Oregon, as amended in 1906, is as follows:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter subject to the constitution and criminal laws of the State of Oregon."

The Railroad Commission Act was enacted after the adoption of the constitutional provision above quoted and is therefore subject to any objection showing a conflict with the constitutional provision.

The legislature having by the Portland charter vested in the city the power to prescribe rates within the city limits, we contend that by the provisions of Section 2 of Article 11 of the constitution, the legislature was without power to vest in the Railroad Commission the power to establish rates within the city limits of Portland. The establishment by the Commission of a single fare rate for a ride partly within and partly without the city limits infringes upon the rights of the city, under its charter, to itself prescribe rates for transportation within the city limits, and to this extent the Railroad Commission Act is without effect. It follows, therefore, that the order of the Commission in this case, not being confined to transportation without the corporate limits of the city, is without authority and void.

We are not unmindful of the decision of this court in the case of Straw vs. Harris, 103 Pac. Rep. 777, wherein this court held that the legislature might, by general law, "at any time revise, amend or even repeal any or all of the charters within it," but the de-
433 cision in the Straw vs. Harris case was based upon the same section of the constitution which expressly authorizes the creation of corporations by general law, and where the power to create corporations by general law is expressly granted to the legislature, it was a proper exercise of such power to authorize, by general law, the creation of corporations to exercise powers which would be in conflict with the provisions of municipal charters. In the case at bar, however, the same rule is not applicable. The Railroad Commission is not a corporation and performs none of the functions or duties of a corporation. It exercises certain inherent powers of the legislature which the legislature has itself delegated to the Commission, and as the legislature is expressly prohibited from altering, amending or repealing any municipal charter, except in the exercise of the power to create corporations by general law, the legislature was without power to delegate to the Commission authority which was not vested in the legislature itself.

The orders of the Commission reducing the rates of fare between Portland and Milwaukee and the Oak Grove group of stations are unconstitutional, invalid and void and in violation of section 10 *of article I of the Constitution of the United States prohibiting the passage by any State or any law impairing the obligation of contracts.*

The appellant is the holder of a franchise from the city of Portland authorizing appellant to charge and collect a fare of 5 cents for transportation within the city limits.

At page 76 of the transcript of record appears the following:

"Mr. GRIFFITH: It is stipulated that the franchise from the city of Portland to the Oregon Water Power and Railway Company now owned by the plaintiff here and under which its system of railways within the city of Portland are operated, provide for a limit of 5 cents covering any single fare in any one general direction within the city of Portland."

That said contract rate of 5 cents within the city limits of Portland was generally recognized is shown by testimony of Louis E. Armstrong whose testimony on page 24 of the transcript is:

434 Q. State whether or not you are satisfied with the commutation fares you are paying?

A. So far as being satisfied, I am like a good many others, if we could get it cheaper we would like it better. We have had two or three arguments down there about that. My argument was that the city of Portland made the fare 5 cents to the city limits and I did not have gall enough to ask them to throw anything off the 3½ cents they charged us from the Golf Links out, so let it alone."

And on page 25 of the transcript in the testimony of the same witness we find:

"Mr. CRAWFORD: What is the cash fare from Golf Links to Center?

A. I don't think I ever paid a cash fare there. I do not remember any case.

Q. How do you figure out 3½ cents between Golf Links and Center?

A. Our tickets are 8½ cents and the city of Portland makes the fare 5 cents to the city limits; that makes 8½ cents. We had arguments in the meetings and I am just stating that is what I argued—that we could not ask them to throw off the 3½ cents."

The franchise granted by the city of Portland to the Oregon Water Power and Railway Company providing a 5 cent fare within the city limits on the lines of railway of the appellant involved in this controversy, constitutes a contract between the city and the company that may not be impaired by subsequent legislation. The contract in this franchise was expressly ratified and confirmed by the legislature itself by the act of the legislature of 1903 incorporating the city of Portland, passed subsequently to the granting of the said franchise. Section 106 of the said city charter provides as follows:

"Nothing in this charter contained shall affect the validity of any franchise, right or privilege in actual use or heretofore given or granted by any former or the present city of Portland, or by the city of East Portland, or by the city of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them."

An act of the legislature ratifying actions of a city council does not require the use of the words "ratify, confirm or validate."

Nottage v. City of Portland, 35 Ore. 556.

That the legislature had power to authorize the city of Portland to enter into a contract fixing the rate of fare within the city limits has been decided by the Supreme Court of the United States in the case of Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, and if the city did not have the power to enter into the said contract at the time of the passage of the franchise, the legislature may thereafter ratify the contract so as to render it
435 inviolable during the term for which said franchise was granted.

Minneapolis v. Minneapolis Street Ry. Co. decided by the Supreme Court of the U. S. Jan. 3, 1910, and reported in the advance sheets of the Supreme Court Reporter, Vol. 30, No. 5, Feb. 1, 1910, page 118.

See also

Pingree v. Michigan C. R. Co. 118 Mich., 314.
Sloan v. Pac. R. Co. 61 Mo. 24.
Freeport Water Co. v. Freeport, 180 U. S. 587.
Los Angeles v. Los Angeles City Water Co., 117 U. S. 558.
St. Louis v. Laclede Gaslight Co., 102 Mo. 472.
Cleveland City Ry. Co. v. Cleveland, 194 U. S. 517.

In the case of Detroit v. Detroit Citizens Street Railway Company, 184 U. S., 368-382, the court said:

"The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract."

And again on page 389 of the opinion, the court said:

"Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than 5 cents, give any right to the city to reduce it below the rate of 5 cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of 5 cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company."

In the Detroit case the council sought to reduce the rates of fare pursuant to an act of the legislature enacted subsequently to the passage of the franchise to the railway company, and the court holds that the legislature was without power to authorize the city to reduce rates of fare which had theretofore been expressly authorized by contract between the city and the railway company.

The case of the city of Minneapolis v. Minneapolis Street Ry. Company arose upon a bill to enjoin the city of Minneapolis from enforcing as against the Railway Company, a certain ordinance of the city passed February 9, 1907, prescribing rate of fare for the transportation of passengers over any street railway line or lines of the company in the city of Minneapolis, and it was alleged in the bill that the ordinance of February 9, 1907, violated the terms of a previous and subsisting contract prescribing the rates of fare to be charged by the company in the city of Minneapolis. It appears in the record that the railway company was organized
436 on July 1, 1873, and that its contract arose from an ordinance of the city of Minneapolis passed July 9, 1875, ratified by an act of the legislature of the State of Minnesota, passed March 4, 1879. By the terms of the ordinance of July 9, 1875, the Railway Company was granted a franchise for 50 years, by the terms of which it had the right to charge a fare not exceeding 5 cents for each person carried on any continuous line which might be designated by the council of the city, such continuous line, however, not to exceed three miles in length. It was claimed that this contract was violated by the ordinance of February 9, 1907, requiring the sale of six tickets for 25 cents.

In the Minneapolis case, it was claimed that at the time the franchise was granted, the city had no power to make a contract fixing the rates of fare for a term of years. But the court held that if such power did not exist in the city at the time of granting the franchise, the want of power was cured by the subsequent ratification of the franchise, by the legislature. The act of the legislature in the Minneapolis case corresponds with the act of the legislature in enacting Section 106 of the Portland charter above quoted. Section 106 is a distinct ratification of all of the terms of existing franchises, and as the right to charge 5 cents was fixed by the ordi-

nance granting the franchise to the predecessor of appellant, such right is now inviolable by virtue of Section 106 of the present charter, whether the right to fix such fares for a definite time was or was not vested in the council of the city at the time of the passage of said franchise.

In the cases at bar, the Railroad Commission has, by its orders, prescribed rates of fare to be charged for transportation of passengers between Milwaukee and the terminal in Portland, three-fifths of which distance is within the city limits, and also rates of fare between the Oak Grove group and the Portland Terminal, two-thirds of which distance is within the city limits. The orders of the Commission therefore undertake to establish rates of fare within the city limits as well as without the city limits. There is no segregation in these orders of the Commission of that portion of the fare
437 to be considered as for transportation within the city limits, and the portion to be considered as transportation without the city limits. We have shown that the rate of fare upon that portion of appellant's line within the city limits has been fixed by an inviolable contract at 5 cents and as the Railroad Commission is without power, under the circumstances, to establish rates of fare within the city limits, we contend that its order in both of these cases is invalid and void as impairing the obligation of the contract between the city and the company. This is especially true in the case of the fare to Milwaukee where, by the order of the Commission, the company is required to transport passengers 1.36 miles beyond the city limits without any additional compensation. The right of the company to charge 5 cents to the city boundary being established by the statutory law, (Sec. 2096 B. & C. Code) and also being authorized by the provisions of the contract between the city and the company, and by said contract the limit of distance the company may be required to transport passengers for 5 cents being fixed at the city boundary, the arbitrary extension of said carriage without compensation violates not only the obligation of the contract between the city and the company, but also deprives the company of its property without due process of law. It is, we believe, well settled that the Railway Company may not be required to devote its property to the use of the public without compensation, and we respectfully refer to the authorities cited in our brief upon this point.

In the Oak Grove case, it is true that the rate of fare fixed by the Commission is greater than that prescribed by the franchise for the carriage of passengers within the city limits, but as the Oak Grove group of stations and Milwaukee are upon the same division of railway and as the Commission has in the Milwaukee case fixed 5 cents as the fare between Milwaukee and the terminal in Portland, it follows that the 10 cent rate of fare fixed by the Commission between the Portland terminus and the Oak Grove group of stations is made up of the two divisions of 5 cents each, to-wit:
438 From 1st and Alder Streets to Milwaukee, 5 cents.
From Milwaukee to Oak Grove group of Stations, 5 cents.
It is clear, therefore, that the 10 cent fare established by the

Commission in the Oak Grove case is subject to the same objection as the 5 cent fare established in the Milwaukee case in this that one-half of the 10 cent Oak Grove fare is made to cover all of the ride within the city limits and the 1.35 miles between the city limits and Milwaukee, notwithstanding the fact that appellant is entitled to all of said 5 cents for the distance within the city limits and to additional compensation for the last 1.35 miles.

It is claimed by the Commission and the court apparently adopts the theory that inasmuch as the appellant has voluntarily established a 5 cent fare from its Portland terminal to Lents, that it has established the value of such service at 5 cents. In our brief we have fully explained the manner in which the 5 cent fare to Lents was established and we have shown that the consideration for the 5 cent fare was not alone the fares collected from the passengers on the Lents line, but in addition thereto the value of the railway given to appellant's predecessor should be considered. In other words, that the fare to Lents is made up of the 5 cents collected from passengers on that line plus the value of the railroad given to appellant's predecessor at the time of establishing the 5 cent fare.

It should not be claimed that because the appellant, in taking over the ownership and operation of the Mount Scott division, continued in force a valid contract made by its predecessor based upon a valuable consideration and continued to charge a fare of 5 cents on the Lents division, that the appellant thereby forfeited its right to charge 5 cents within the city limits upon other lines of its railway, as authorized by its contract with the city.

In the case of Minneapolis v. Minneapolis Street Ry. ante, it was claimed that because the Street Railway Company being the holder of a franchise authorizing a fare of 5 cents, voluntarily accepted a regulation of the city requiring it to issue transfers, that
439 the Railway Company thereby waived its right to preserve the 5 cent fares authorized by the franchise. In discussing this point the Supreme Court of the United States, at page 124 of the opinion, says:

"It is true that by the ordinance of July 9, 1875, there was no right to reduce the passenger fare below 5 cents over any one continuous line not more than 3 miles in length, to be designated by the city council. By the terms of the ordinance of September 19, 1890, transfers were to be allowed, so that, for one full fare, a passenger might receive a continuous trip very considerably exceeding 3 miles in length,—it is stated in one of the briefs to include a trip of 11 miles. But we do not understand that the acceptance of this regulation had the effect to abrogate the contract as to the right to charge a fare of 5 cents over one continuous line, that is, for one continuous passage. Acquiescence in a regulation which may not have been deemed injurious, and may have been deemed wise and expedient, does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights."

Aside from all other considerations justifying a difference in fares on the several lines in controversy, it appears to us that the fare to Lents cannot be considered as sufficient ground for authoriz-

ing a violation of the contract right of the company to charge 5 cents for that portion within the city limits of every ride upon its lines.

The Commission has no power to require appellant to issue transfers to passengers from Milwaukee and Oak Grove for transportation over the lines of Portland Railway Company.

At the time of the hearing of these cases before the Railroad Commission the appellant was the owner of and operated what was known as the Oregon Water Power system of railways, which are fully defined in the record and in our brief. At the same time Portland Railway Company was the owner of and engaged in operating all of the street railway lines in the city of Portland. It was established at the trial that by agreement with Portland Railway Company, the appellant issued transfers to passengers from its Mount Scott division entitling such passengers to transportation over the lines of Portland Railway Company within the city limits of Portland, and that by arrangement with said Portland Railway Company, appellant issued transfers to passengers from Nickum
440 good over the city lines of Portland Railway Company.

By the orders of the Commission in these cases, appellant is required to issue transfers to passengers from Milwaukee and Oak Grove entitling such passengers to transportation over the city lines of Portland Railway Company. This part of the order of the Commission is clearly invalid in that appellant is directed and required to issue transfers to said passengers from Oak Grove and Milwaukee entitling such passengers to transportation over the lines of railway of another and distinct corporation. By this order the Commission undertakes to control and adjust the rates of fare not only upon the lines of railway of the appellant, but also upon the lines of another corporation which is in nowise made a party to the case. The right to compel the issuance of transfers good on the lines of Portland Railway Company is apparently based upon the fact that the appellant, at the time of the hearing, was the owner of a majority of the stock of Portland Railway Company. The fact that the appellant was the owner of a majority of said stock does not affect the corporate entity of Portland Railway Company. The order requiring the issuance and acceptance of transfers on the lines of Portland Railway Company was either an attempt by indirection to include the fares of Portland Railway Company in the order of the Commission or to compel the appellant to arrange with Portland Railway Company to honor such transfers.

The Commission, by the terms of the act creating it, is denied power to regulate fares within municipal corporations, and even if it had such power, it certainly could not make an order adjusting the rates of Portland Railway Company without first acquiring jurisdiction of the Portland Railway Company in the manner provided by the Railroad Commission Act.

We are forced, however, to the conclusion that the Commission, by its order requiring the issuance of transfers, seeks to compel the

appellant to enter into an agreement with another corporation over which the Commission had no and has no jurisdiction, and without any showing whatever that the Portland Railway Company would enter any such agreement.

In the case of Chicago City Ry. Company v. the City of
441 Chicago, 142 Fed. Rep. 844, it was sought to compel two independent street railway companies of the city of Chicago to exchange transfers in accordance with an ordinance of the city requiring such exchange. In denying the right of the city to require such exchange of transfers, the court said:

"The enjoyment of property is not simply the right to have the property as valuable as it was before, especially if the judgment as to that value would be exercised by somebody else. The right to enjoy property is the right to not simply obtain all the increment it brings with it. I cannot be said to enjoy my property if some one else, a stranger to me in that respect, can compel me to enjoy it in any way but his way; although he be beneficient enough to say, and to prove, that such exercise of it will not hurt me financially. It does hurt me in my rights as a property owner. It does hurt me in the enjoyment of my property. He may not compel me to go into a co-partnership with somebody whom I don't care to go into a co-partnership with. He may not compel me to link up my business with strangers. Strangers may or may not honestly observe reciprocal relations. The enjoyment of property meant by the 14th Amendment is that full exercise of dominion over one's own property—over that which one has himself created—that the whole law of property, from ancient times down to the present time, gives to a man, subject only to the paramount rights of the State. And if the State has any paramount interest it must exercise it under the other provisions in the Constitution and in the way pointed out. The City and State may take property either for the purpose of operating it itself, or for the purpose of linking it up with some larger corporation, and allowing the larger corporation to operate it on the one-transfer and one-fare principle, but the State cannot compel either one of these companies to do that. The State can take it by paying for it. But it cannot compel these companies to enter involuntarily into a co-partnership such as that. To do that is to take one of its rights of enjoyment of property without due process of law. If the City can do that, it can put forward its advances step by step, until there is no property right left at all; until the State would have control of everything; and upon the mere defense that it was doing no injury—that in the end one got more, or as much of it as he was getting before—would take away the dominion entirely. Dominion is enjoyment, and dominion is a part of the property right that the 14th Amendment was intended to protect."

Inasmuch as the Portland Railway Company was not before the Commission or the court in these cases, and inasmuch as appellant had no legal power to compel Portland Railway Company to accept transfers to be issued in accordance wth the orders of the Commission, it seems to us that the order requiring the issuance of transfers was beyond the powers of the Commission and void.

Assuming for the sake of argument, that the issuance of transfers to passengers on the Lents and Nickum lines, constituted a discrimination against passengers from Milwaukee and Oak Grove, and assuming also, as decided by this court, that the Lents con-
442 tract providing for the issuance of such transfers is subject to subsequent acts of the legislature, such as the Railroad Commission Act, then it would seem to us that the only proper order to be made regarding transfers, if any should have been made by the Commission, would be that the issuance of transfers to Lents and Nickum passengers should be discontinued.

In calling the court's attention to the different points mentioned in this petition for rehearing, we have felt that the importance of the issues involved warranted us in urging these points upon the notice of the court. The decision of the court in these cases is fraught with most serious consequences to appellant. We feel that the orders of the Commission, if enforced, would result in great and irreparable injury to the appellant and would violate the rights of the appellant, which we believe to be guaranteed to it by the Constitutions of the United States and of the State of Oregon. These are the first cases to come before the court upon the question of the power of the Commission to establish rates and the decision of the court here will constitute a precedent for all future cases of similar nature. We hold the judgment and opinion of this court in high regard and are convinced that the decision heretofore rendered is due to our failure to present to the court in our brief and oral argument, with sufficient clearness, the rights of the appellant, and the rights and limitations of the respondent. We have endeavored, within the necessarily limited scope of this petition, to make clear to the court the contentions of the appellant. We trust that we have succeeded and however fixed the court may be in its expressed opinion, we beseech its careful reconsideration of the important questions here involved.

FRANKLIN T. GRIFFITH,
FRED'K V. HOLMAN,
Attorneys for Appellant.

443 STATE OF OREGON,
County of Multnomah, ss:

I, Franklin T. Griffith, Appellant's attorney, do hereby certify that I have prepared the foregoing copy of Petition for rehearing and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 7 day of April, 1910.

FRANKLIN T. GRIFFITH.

[Endorsed:] No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff, vs. Railroad Commission of Oregon, Defendant. (Copy of) Petition for Rehearing. Filed April 8, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Fred'k V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Appellant.

444 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Respondent.

Appellant's Reply to Answer of Respondent on Petition for Rehearing.

If we have misread the orders of the Commission, we are not alone in error. This court has read the orders of the Commission to the same effect as counsel for appellant. In the statement of the case prepared by this court, Mr. Chief Justice Moore, after reciting the fact that passengers on the Mount Scott division received transfer tickets entitling them to further transportation over lines of railway controlled by appellant in Portland, says:

"Upon investigation, pursuant to notice, the Commission stated the facts in substance, as hereinbefore detailed, determined, by an original and supplemental finding, that the 10¢ fare specified was subject to the charge interposed, and made an order requiring the plaintiff to desist from demanding or collecting more than 5¢ of any individual for such transportation in either direction, and also to deliver such passengers the same transfer privileges that were accorded to persons travelling between Lents and Portland."

Again in the body of the decision, the Chief Justice says:

"The contract rate of 5¢, however, was taken as the basis of a reasonable compensation by which to measure the fare to be charged on the Oregon City division for an equal distance, and for conceding the same transfer privileges that are granted on the Mount Scott division."

The solution of the difficulty suggested by the Commission in its answer to our petition appears to us to be weak and unsatisfactory. Counsel for respondent say:

"The order of the Commission would be met (*a*) by giving such transfers as the company saw fit to continue to give to Lents passengers in the future, of (*b*) by the appellant discontinuing its practice of giving transfers to the Lents passengers."

If this be true, would counsel for the respondent be equally well satisfied if the appellant should cease to charge 5¢ between Portland and Lents and raise the rate on said line to 10¢ and leave the Milwaukee rate at 10¢? Such a course would remove the dis-
445 crimination by placing both points on an equal footing. Much as we would like to accept this construction of the Commission's order as a precedent for action which the Commission will deem a compliance with its orders, we fear the Commission itself would not coincide with the views of its counsel.

One of the chief contentions of the respondent was that the giving of transfers by Portland Railway Company to passengers over the Lents line and the giving of transfers by appellant to passengers from Lents over the line of Portland Railway Company, constituted

a discrimination against Milwaukee passengers. The Commission found, as a fact,

"that from points on the Mount Scott division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof. * * * The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory."

Having found that transfers were issued over other lines, as aforesaid, the Commissioner ordered,

"that the said defendant shall furnish to all persons who shall pay the said rate of 10¢ (5¢ in the Milwaukee case) as aforesaid, the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction."

In the final order of the Commission, it is provided:

"That the said rate so fixed and determined, and the said practice in regard to transfers, shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory * * * and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty (30) days after such service."

There appears to us to be no ambiguity in the language employed by the Commission in its order. The requirement that we shall issue transfers is, by the order, inseparably tied to the requirement of the order establishing the rate of fare. No authority is given the appellant by the Commission's order to remove the alleged discrimination in any other manner than that fixed by the order itself, to-wit: To reduce the rate of fare to Milwaukee 5¢ and to the Oak Grove group to 10¢ and in each case give to passengers on said lines, in
446 either direction, transfers to and from the lines of Portland Railway Company, which has been shown by the record to be the only railway with which transfer privileges are exchanged by appellant and which was made the subject of an express finding of fact by the trial court. (See finding No. 15 on page 39 of the abstract of the Milwaukee case, and page 37 of the abstract of the Oak Grove case.)

Counsel for the respondent apparently attach some importance to the fact that Portland Railway Company is not specifically mentioned in the orders of the Commission appealed from. We find, however, that finding No. 5 of the Commission (page 22 of Milwaukee abstract and page 44 of Oak Grove abstract) recites that the defendant furnishes to passengers transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway. Having found an existing fact that transfers are issued over other lines of railway than those of appellant, which other lines of railway are not parties to this case, can it be said that such other lines of railway are not necessary parties to a proceeding requiring them to exchange transfers with appellant?

Counsel for the Commission, on page 2 of their answer, say:

"The order of the Commission was not 'Issue transfers' but was: 'Stop discriminating; give transfers or not, but treat all your lines alike.'"

We cannot agree with counsel for respondent as to the meaning of the language employed by the Commission in making its order. It will be remembered by the court that the reasonableness of appellant's fares was not questioned; that the fares charged on the Oregon City division were held by the trial court not unreasonable for the services rendered, but that such rates of fare were discriminatory. It would logically follow, therefore, that if, in the language of counsel for respondent, the whole effect of the order of the Commission was to stop discriminating and treat all lines alike, that such order would be met by raising the fare between Lents and Portland to 10¢, or at the option of the appellant, reducing the fare to Milwaukee 5¢ and to Oak Grove group 10¢. This, however, is not the effect of the Commission's order. Instead of leaving the adjustment of the discrimination to the option of the appellant, the Commission
447 establishes and by its order puts into effect the lower rates on the Oregon City division which it contends should be established as the only method to adjust the alleged discrimination due to the 5¢ fare to Lents, and notwithstanding the emergency construction of respondent's counsel, we believe the order of the Commission can bear only that construction regarding the issuance of transfers which precludes the exercise of any option on the part of appellant in complying therewith, and as a compliance with the order of the Commission necessarily involves the rights of another corporation, not a party to the hearing, we submit that the Commission's order, in this respect, was wholly beyond its jurisdiction and void.

Counsel for respondent in their answer to the petition, say:

"Appellant and not the Portland Railway Company was the carrier which gave the transfers complained of."

The court will remember that the order of the Commission finds that transfers are exchanged in either direction between the Lents line and those of Portland Railway Company. The order of the Commission requires the issuance of transfers in either direction between Portland and Milwaukee and between Portland and the Oak Grove group of stations. This language can mean but one thing: That passengers on city lines of Portland Railway Company should be entitled to and should receive transfers from Portland Railway Company entitling them to transportation over lines of appellant from Portland to Milwaukee and Oak Grove, and that passengers on the Oregon City division should receive transfers from appellant entitling them to transportation over lines of Portland Railway Company in the City of Portland. It is impossible to conceive of any other manner by which passengers could receive transfers "in either direction" as provided in the order of the Commission.

The contentions of counsel for respondent are inconsistent. At first counsel claims that the order of the Commission does not affect Portland Railway Company and that its order could be complied with by discontinuing the issuance of any transfers. Counsel for

respondent then attempts to show that it was not necessary
448 to make Portland Railway Company a party to the case, notwithstanding the fact that the order did affect the Portland Railway Company. In other words, after claiming that Portland Railway Company is in no wise affected by the order, counsel then proceeds to show that although Portland Railway Company is affected by the order, it was not necessary that it be made a party to the case in order to bind it by the order of the Commission.

Counsel cites several cases as supporting the doctrine that all of the railroads, parties to a joint rate, are not necessary parties defendant to a proceeding seeking to adjust such rate. The cases cited by respondent are not in point. Distinction is made in the decisions cited by respondent between "proper" and "necessary" parties. The decisions hold that while all of the parties to a joint rate would be proper parties defendant in a proceeding to adjust such joint rate, they are not always necessary because the complaint may be directed to the charge of only one of the parties to the joint rate and the party so affected would be a necessary party. So in the case of Warren-Ehret Company vs. Central Railroad of New Jersey and New York, New Haven and Hartford Railroad Company, 8 I. C. C. Rep. 598, cited by respondent, it was held that although the Philadelphia and Reading Railroad Company would be a proper party to the proceeding to adjust a joint rate in which it participated, together with the two defendants named, the Philadelphia and Reading was not a necessary party for the reason that the order of the Commission affected only that portion of the total joint rate which was taken by the New York, New Haven and Hartford Railroad Company, properly joined as defendant.

In the case of Texas and Pacific Railroad Company versus I. C. C. 162 U. S. 197, cited by respondent, an attempt was made to enjoin the T. and P. R. R. Company from disobeying an order of the Interstate Commerce Commission adjusting a joint rate. In this case it was claimed that Southern Pacific Company, one of the participants in the joint rate, was not joined at a party defendant and, therefore, that the bill should be dismissed for want of such necessary party. The Supreme Court held, however, that although Southern Pacific Company would have been a proper party to the pro-
449 ceeding, it was not a necessary party for the reason that

"so far as the present case is concerned, that the Commission held that the Texas Pacific Railroad Company was not justified in accepting as its share of a through rate on imported traffic a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery."

The order of the Interstate Commerce Commission, which was the basis of the controversy decided by the Supreme Court, applied to the Texas and Pacific Railroad Company expressly as to its pro rata share of the through joint rates, and the question being limited to the application of the order to the Texas and Pacific Railroad Company, it was held that Southern Pacific Company was not a necessary party.

The case at bar is essentially different from the Texas case quoted. Here the order of the Commission is not confined to that portion of

the service wholly controlled by appellant, but includes as well the service of Portland Railway Company.

The case of Cattle Raisers' Association versus Chicago, Burlington & Quincy Railroad Company, 10 I. C. C. Rep. 83, cited by respondent, was a case wherein the Commission held that while all the parcipants in the through rate would be proper parties, that all such participants were not necessary parties for the reason that that portion of the through rate represented by the terminal charges was the only thing complained of and that such terminal charges were taken by the defendants properly joined. The participants in the through rate, not joined as defendant, had no interest in the controversy and, therefore, were not necessary parties.

As pointing out the distinction between proper parties and necessary parties, see Section 1057, Beale and Wyman Railroad Rate Regulation.

The case of Mayor, etc., vs. A. T. and S. F. Ry. Company, 9 I. C. C. Rep. 534, cited by the respondent, does not support the contention of counsel for two reasons: First, because the Commission itself held that the St. Louis, Iron Mountain and Southern Railway Company was not a necessary party, and, second, that under the procedure before the Interstate Commerce Commission at the time of hearing the case, legal service was not required to be made upon the Iron Mountain Company.

450 There is a definite method of procedure prescribed by the Railroad Commission Act for the adjustment of joint rates. Section 28 of Chapter 53, Session Laws of 1907, provides, that upon complaint of any person, firm, corporation or association, etc., that any of the joint rate or rates are in any respect unreasonable or unjustly discriminatory, that notice shall be given to the railroads complained of and it is only after a hearing held pursuant to the said Section 28 at which the railroads affected are represented or have been notified to be present, that the Commission has any power to establish joint rates. In effect, the order of the Commission requiring the exchange of transfers attempts to establish a joint rate over lines of the appellant and those of the Portland Railway Company. This could be done, if at all, only by following the procedure prescribed by the act itself, which includes and requires notice to the railroads interested and a proper hearing at which the railroads interested may be represented. The statutory procedure not having been followed in respect to Portland Railway Company and said last named company being made a necessary party to such hearing by the terms of the act itself, it follows, that the orders of the Commission affecting Portland Railway Company are void.

Respectfully submitted,

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Appellant.

451 STATE OF OREGON,
County of Multnomah, ss:

I, Franklin T. Griffith, appellant's attorney, do hereby certify that I have prepared the foregoing copy of Reply and have carefully

compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 21 day of May 1910.

FRANKLIN T. GRIFFITH.

(Endorsed:) (Copy.) No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., appellant, Plaintiff, vs. R. R. Commission of Oregon, Defendant. Reply to Respondent's answer to Petition for Rehearing. Filed May 23 1910. J. C. Moreland, Clerk, by —— ——, Deputy. F. V. Holman and Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorney for Appellant.

452 In the Supreme Court of the State of Oregon.

PORTLAND RY., LIGHT & POWER CO., a Corporation, Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from the Circuit Court of Marion County.

On Petition for Rehearing.

For former opinion see 105 Pac., 709.
Slater, J.
Denied.
Filed June 7, 1910.

J. C. MORELAND,
Clerk of the Supreme Court.

453 SLATER, *J.*:

Plaintiff has presented an elaborate petition for rehearing, amounting practically to a reargument of the whole case. The broad position is taken that the railroad commission act, the orders of the commission, and the decisions of the court, are in violation of section 1, art. 14, of the Constitution of the United States, prohibiting any state from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protestion of the law. We have carefully considered the able argument of counsel in support of this contention, but find ourselves unable to assent to their conclusions. The several principles of law stated in the argument are undoubtedly sound, and not to be questioned, but in applying the reasons of the law to the facts of the case we fail to fully agree with counsel. The principles are that a corporation is a person within the meaning of the fourteenth amendment, which forbids the state to deny to any person within its jurisdiction the equal protection of the laws, and prohibits the taking of property without due process of law; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a corporation

cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it; and that the requirements of the fourteenth amendment apply both to privileges conferred and liabilities imposed, and no greater burdens should be imposed upon one than are laid upon others in the same calling and condition. The complaint made to the commission against plaintiff involved two causes of alleged unjust and unreasonable discrimination as against the town of Milwaukee—one in charging a higher rate of fare to the citizens thereof than was charged the citizens of the town of Lents, under like and contemporaneous service; and the second in giving to the latter transfers to other lines in the city of Portland, which transfers were denied the former.

As to the second of these questions, it is now maintained for the first time that the order of the commission requires plaintiff to furnish such transfers to its passengers traveling from Milwaukee station into Portland, and that, to that extent, the order affects the rights of another corporation not a party to the proceedings, for which reason, if for no other, the order would be void. It is contended that at the time of the hearing before the commission the plaintiff was the owner and operator of the three lines of railway described in the pleadings; that the Portland Railway Company, another corporation, was the owner of and operated all other street railways in Portland, and that the transfers spoken of in the record secured the privilege of traveling on such other street railways without the payment of additional fares; that if plaintiff were required by order of the commission to furnish transfers to its passengers from the town of Milwaukee, and required that they be accepted by the owner of the railways to whom they were directed, the effect thereof would be to bind such owner, without it having been permitted to be heard. The Railroad Commission's order in that respect is not a positive command to the plaintiff to give transfers, nor that they be accepted by any one, but the order is, in effect, to cease an unlawful discrimination between the passengers from Lents and those from Milwaukee by desisting from refusing the latter the same transfer privileges as accorded to the former, and that plaintiff should furnish to all persons paying the rates of fare fixed by the commission in its order the same transfer privileges accorded Lents passengers. The order of the commission would, therefore, be complied with by giving such transfers to all, as plaintiff saw fit to continue to give to Lentz passengers, or by desisting entirely from its practice of giving transfers to Lents passengers. Which of these two courses is to be taken is left to plaintiff's option. It was not bound in the first place by any mandate of the law, or by any contractual obligation of its predecessor in interest, or of itself, to furnish transfers to Lentz passengers. The giving of them was purely voluntary, and a gratuity, which, being refused to its other patrons, constituted an unlawful discrimination. This is within the power of the board to rectify by an order directed to the plaintiff alone.

Upon the other question, the discrimination as to the amount of fare charged the respective communities by plaintiff, we are not entirely free from doubt as to the proper remedy. It was said in the main opinion that "the 10-cent fare between Portland and Mil-

waukee is not unreasonable when compared with the charges made by other railway companies for similar service." Using that statement as a premise for an argument, it is urged in the motion that such statement is a finding that the specified rate is per se reasonable which giving effect to the constitutional guaranties heretofore noted, precludes the state or its agent from making any reduction. But it was stated in immediate connection with that remark that the law authorizes an investigation upon a complaint as to a charge, which is in any respect "unreasonable or unjustly discriminatory." "The fact that a rate is per se reasonable does not disprove the charge that it is unlawful," say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. "If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive." The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed
454 it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, § 838.

Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare, because of the alleged contract between its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power, as was held in the main opinion, to thus bind the state or restrict it in its future regulation of fares. On account, however, of the forfeiture clause of this contract, it was doubtless considered by the commission that to order plaintiff to increase the rate of its fare at Lents in order to avoid the discrimination complained of would cause it to hazard a greater loss than to lower the rate of fare at Milwaukee. It therefore chose the latter, and under the circumstances of the case we think it was justified in so doing, inasmuch as the foregoing clause of the contract expires by limitation on April 30, 1911, after which time plaintiff will be free to act upon its own judgment in the premises, and so to arrange its schedule of fares as to avoid any just complaint of discrimination.

Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is 50 per cent. less than that of the line to Milwaukee, and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the roadbed conveyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal right of a competing

locality diminished by municipal or other subscriptions advanced for the building of the road. Beale and Wyman, § 839.

It is also complained that the reduction of the rate from 10 to 5 cents at Milwaukee and from 15 to 10 cents at Oak Grove will entail upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City. We do not think this necessarily follows, but, if it should, we are of the opinion that the consequences contemplated would result from the arbitrary manner by which plaintiff has divided its road into five-cent zones for regulating the amount of its charges, and for these reasons we think it ought not to be heard to complain.

It is also claimed in the motion that the state, and hence its agent, the Railroad Commission, has no power to regulate fares within the limits of the city of Portland, because that right has been delegated to the city, and also because the city in granting plaintiff its franchise has limited the plaintiff to a charge of five cents for any single fare, in one general direction, within the city of Portland. It is further claimed that such right it a vested contractual right. Assuming that these claims are well founded, still we do not see that the order of the commission attempts to regulate fares within the city, for it operates only upon traffic originating or extending beyond the boundaries of the corporate limits. The general grant of power contained in the city charter of 1903 is "to prescribe rates to be charged for transportation of passengers or property within the limits of the city, etc. Sess. Laws 1903, § 73, par. 71. On the other hand, the special limitations of the power of the commission is "that this act shall not apply to the transportation of passengers being carried solely within the limits of cities by street and other railroads," etc. Sess. Laws 1907, § 11, p. 71. The distinction between the two respective grants of power and that exercised by the commission in making the order sought to be set aside in this proceeding is clear and obvious.

The motion therefore will be denied.

455 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Assignments of Error on the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

Comes now the Portland Railway Light and Power Company the above named plaintiff (appellant) and files the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the Supreme Court of the United States to the Supreme Court of the State of Oregon, from the decree made by the Supreme Court of the State of Oregon

on the 21st day of December, 1909, in the above entitled cause and the proceedings had prior thereto in the above entitled cause, and upon the decision of the Supreme Court of the State of Oregon in denying the petition for rehearing of the above named plaintiff (appellant) in the above entitled cause made and filed therein on the 7th day of June, 1910, and said plaintiff (appellant) respectfully submits that in the record, proceedings and decision in said cause and on said petition for rehearing and final judgment of the Supreme Court of the State of Oregon in the above entitled cause, there is manifest error in this, to-wit:

I.

That the court erred in holding and deciding that the order of the Railroad Commission of Oregon on which the above entitled suit was brought rendered on the 30th day of January, 1908, is not in conflict with and in violation of the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America, and which said order assumes and seeks (1) to deprive the above named plaintiff, (appellant) of its property without due process of law, (2) to deprive and to deny to the plaintiff (appellant) (a citizen of the State of Oregon) the equal protection of the law.

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II.

The court erred in holding that said order of the Railroad Commission of Oregon is not in conflict with and in violation of the provisions of Section 10 of Article I of the Constitution of the United States of America and that said order is not in violation thereof.

III.

The court erred in holding that by and under the provisions of said order of the Railroad Commission of Oregon plaintiff (appellant) is not deprived of its property without due process of law.

IV.

The court erred in holding that said order of the Railroad Commission of Oregon does not deny the plaintiff (appellant) the equal protection of the law.

V.

The court erred in holding that said order of the Railroad Commission of Oregon and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the legislative departments of the State of Oregon.

VI.

The court erred in holding that Chapter 53 of the General Laws of Oregon for the year 1907, enacted by the legislative assembly of

the State of Oregon at the legislative session thereof held in the year 1907, does not abridge the rights, privileges and immunities of this plaintiff, (appellant) as guaranteed by the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America.

VII.

The court erred in holding that said order of the Railroad Commission of Oregon is not in violation of Section 10 of Article 1 of the Constitution of the United States of America, violating the obligation of contract.

VIII.

The court erred in denying plaintiff's (appellant's) petition for *for* rehearing duly filed in the above entitled cause.

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IX.

The court erred in construing Section 48 of Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said Section 48 as being limited to a consideration of relative mileage from the corporate limits of the City of Portland to different points on different lines of the railway of the plaintiff in error outside the corporate limits of said City of Portland, and denying the right and duty of the defendant in error to consider all of the dissimilar circumstances and conditions surrounding the service between different points on said lines of railway, in determining whether or not the rates of fare charged by plaintiff in error on one of said lines are unreasonable or unjustly discriminatory, thereby denying to plaintiff in error the equal protection of the laws and abridging the rights and privileges of plaintiff in error guaranteed to it under the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

X.

The court erred in holding that defendant in error had the power under said Chapter 53 of the General Laws of Oregon for the year 1907, to enforce an order fixing a rate of fare for transportation to a point beyond the corporate limits of the City of Portland from a point within said city which allowed plaintiff in error no additional compensation for the portion of said transportation outside of said city, notwithstanding the fact that by franchise and contract between the plaintiff in error and the City of Portland, plaintiff in error is authorized to charge and collect the amount of fare so fixed by defendant in error for transportation entirely within said corporate limits and notwithstanding the further fact that by the provisions of said Chapter 53 the defendant in error is expressly prohibited from exercising any jurisdiction over the transportation of passengers solely within the limits of said city.

XI.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn
458 in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section I of the 14th Amendment of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Article 1 of the 14th Amendment of the Constitution of the United States of America.

XII.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 10 of Article I of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Section 10 of Article I of the Constitution of the United States of America.

XIII.

The court erred in granting and entering a decree in favor of defendant (respondent) and not entering a decree in favor of the plaintiff (appellant).

Wherefore, said Portland Railway Light and Power Company prays that the judgment, decree and decisions aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things which it has lost by the action and because of the said judgment, decree and decisions.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway Light and Power Company, Plaintiff (Appellant).

459 [Endorsed:] Case No. 6967, Drawer No. —. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Assignment of Errors and Prayer. Filed June 13 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman, Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in Error.

460 In the Supreme Court of the State of Oregon.

Case No. 6967.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

RAILROAD COMMISSION OF OREGON, Respondent.

Petition for Writ of Error to the United States Supreme Court.

To the Honorable F. A. Moore, Chief Justice of the Supreme Court of the State of Oregon:

Now at this time comes the Portland Railway, Light and Power Company, a corporation, plaintiff and appellant herein, feeling itself aggrieved by the decision of the Supreme Court of the State of Oregon by that certain judgment and decree therein entered in the above entitled cause in favor of the defendant and against this plaintiff, on the 21st day of December 1909, and petitions the above entitled Court for an order allowing said plaintiff and appellant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf provided, and said plaintiff and appellant says that in said judgment and decree and the proceedings had prior thereto in the above entitled cause, certain errors were committed to the prejudice of this plaintiff and appellant, all of which will in more detail appear from the assignment of errors to be filed in the matter of such writ of error.

And said plaintiff and appellant asks that an order be made by the Supreme Court of the State of Oregon fixing the amount of security which said plaintiff and appellant shall give and furnish upon said writ of error, and upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

461 And said plaintiff and appellant further asks this Court for allowance of time in which to file its assignment of errors in this matter — be fixed by this Court.

And said plaintiff and appellant further shows that a federal question was made in said cause necessary to the decision of said cause, to-wit:

That the order of the Railroad Commission of Oregon, against which said suit was brought, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also Section 2 of Article XI of the Constitution of the United States, and that the said judgment and decree of the said Supreme Court of the State of Oregon is repugnant to and in conflict with said Section 1 of the Fourteenth Amendment and said Section 2 of Article XI of the Constitution of the United States, and that a decision of said federal questions was necessary to said judgment and decree rendered.

Wherefore, said plaintiff and appellant prays that a writ of error to said Supreme Court of the United States be allowed and that citation be granted and signed upon the plaintiff and appellant filing in the Supreme Court of the State of Oregon its assignment of errors and upon the filing and approval of such bond within the time fixed by the order of this Court as hereinbefore prayed for, and that upon compliance with such order and with the terms of the statute in such cases made and provided, said bond and writ of error may operate — a supersedeas; and that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of Oregon be reversed, and that a transcript of the record, proceedings and papers in the above entitled cause duly authenticated may be sent to the said Supreme Court of the United States, and that an order be made that until the expiration of the time to be allowed by the Supreme Court of the State of Oregon for the filing of said assignment of errors and bond that no mandate issue out of the
462 Supreme Court of the State of Oregon to the Circuit Court of the State of Oregon for the County of Marion.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway, Light and Power Company, Plaintiff and Appellant.

463 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Portland Railway Light and Power Company, a corporation, Appellant (Plaintiff), vs. Railroad Commission of Oregon, Respondent (Defendant). Petition for Writ of Error to Supreme Court of the United States. Filed June 9, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Frederick V. Holman and Franklin T. Griffith, Attorney- for Portland Railway, Light and Power Company.

464 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),
vs.
RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

The above entitled matter coming on regularly to be heard upon the petition of the Portland Railway Light and Power Company, plaintiff (appellant) therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon examination of said petition and the record in the said matter and the assignments of error filed therein, and desiring to give said Portland Railway Light and Power Company an

opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered, that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond for the sum of Twenty Thousand ($20,000.00) Dollars presented by said Portland Railway Light and Power Company is hereby approved, which shall act as a supersedeas.

It is further ordered, that pending the determination of said writ of error, said Portland Railway Light and Power Company shall continue to issue to each person traveling as a passenger upon the Oregon City division of the railway of said plaintiff (appellant) between the station of Milwaukee and First and Alder Streets in the City of Portland, Oregon, in either direction and paying a cash fare therefor of ten cents, a receipt or other evidence to the effect that five cents of said ten cents cash fare has been paid by such person or passenger, subject to repayment to such person or passenger by said plaintiff (appellant), should the decree of this court in said cause be affirmed by the Supreme Court of the United States.

FRANK A. MOORE,
Chief Justice of the Supreme Court of Oregon.

Dated June 13, 1910.

465 [Endorsed:] Case No. 6967, Drawer No. —. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., plaintiff in error, vs. Railroad Commission of Oregon, defendant in error. Order allowing writ of error. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman, Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for plaintiff in error.

466 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

Know all men by these presents: That the above named Portland Railway Light and Power Company, as principal, and Oregon Surety and Casualty Company, (a corporation duly incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at the City of Portland, Oregon,) as surety, are held and firmly bound unto the Railroad Commission of Oregon, (hereinafter called "said obligee") in the sum of Twenty Thousand ($20,000.00) Dollars lawful money of the United States to be paid to said obligee, its successors, representatives and assigns, and for the benefit of whom it may concern, the payment of which well and truly to be made, said principal and surety bind themselves and their respective successors jointly and severally by these presents.

Whereas, the above named principal has prosecuted a writ of

error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the State of Oregon.

Now, therefore, the conditions of this obligation are such that if the above named Portland Railway Light and Power Company shall prosecute its said writ of error, to effect and answer all costs and damages if it shall fail to make good its plea and shall pay all compensation of whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said Railroad Commission of Oregon dated January 30th, 1908, as amended April 11th, 1908, had not been stayed and suspended during the period transpiring from the time of taking said writ of error until the final determination of the above entitled suit in the Supreme Court of the United States as it or they may sustain by reason of said writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

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In witness whereof, said Portland Railway Light and Power Company has caused these presents to be signed in its corporate name by its President, and said Oregon Surety and Casualty Company has caused these presents to be signed in its corporate name by its General Agent, a member of the Executive Board and by its General Counsel, this the 13th day of June, 1910.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
By R. S. JOSSELYN, *President.*
OREGON SURETY AND CASUALTY COMPANY,
DOOLY & CO.,
[SEAL.] By FRANK E. DOOLY, *General Agent.*
By GAY LOMBARD,
Member of Executive Board.
By WILBUR & SPENCER,
General Counsel.
By R. W. WILBUR.

Bond Approved and to operate as a supersedeas.
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] No. 6967. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff in Error vs. Railroad Commission of Oregon, Defendant in error. Bond on Writ of Error. Filed June 13, 1910, J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith 811-814 Electric Bldg. Portland, Oregon, Attorney- for Plaintiff in Error.

468 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Portland Railway Light and Power Company, a corporation, and Railroad Commission of Oregon, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Portland Railway Light and Power Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
469 to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Oregon.]

T. H. MARSH,
Clerk of the Circuit Court of United States
for the District of Oregon.

Allowed by—
FRANK A. MOORE,
Chief Justice of the Supreme Court
of the State of Oregon.

Attest:

[Seal Supreme Court, State of Oregon. The Union. 1859.]

J. C. MORELAND,
Clerk of the Supreme Court
of the State of Oregon.

470 [Endorsed:] Case No. 6967, Drawer No. —. In the Supreme Court of the United States. Portland Railway, Light and Power Company, a corporation, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Writ of Error. Filed Jun- 13, 1910. J. C. Moreland, Clerk of the Supreme Court, by Arthur S. Benson, Deputy.

471 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Railroad Commission of Oregon, and to A. M. Crawford, Attorney General, and R. R. Giltner and R. E. Sewall, its attorneys, Greeting:

You are hereby cited and admonished to appear and be at the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof pursuant to the writ of error filed in the office of the Clerk of the Supreme Court of the State of Oregon, wherein Portland Railway Light and Power Company is plaintiff in error and you, said Railroad Commission of Oregon, are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, this thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court State of Oregan. 1859.]

FRANK A. MOORE,
Chief Justice of the Supreme Court
of the State of Oregon.

Attest:

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Due service of the within citation and receipt of copy thereof is hereby acknowledged this 16th day of June, 1910, at the office of the Attorney General of the State of Oregon.

A. M. CRAWFORD,
Attorney General, of Attorneys for Railroad
Commission of Oregon, Defendant in Error.

472 STATE OF OREGON,
County of Marion, ss:

Franklin T. Griffith, of lawful age, being first duly sworn, on oath deposes and says:

That I was duly authorized and deputized by Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, to serve upon the defendant in error the citation hereto attached. I served the same by delivering personally to R. E. Sewall one of attorneys of record for Railroad Commission of Oregon, defendant in error, a true and certified copy of said citation with all endorsements thereon, at Portland, Oregon, June 13th, 1910, at 4:30 P. M.

Witness my hand this 13th day of June, 1910.

FRANKLIN T. GRIFFITH.

Subscribed and sworn to before me this 13th day of June, 1910.

[Seal Clarence L. Eaton, Notary Public, State of Oregon.]

CLARENCE L. EATON,
Notary Public for Oregon.

473 [Endorsed:] No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff in error, vs. Railroad Commission of Oregon, Defendant in error. Citation. Filed June 16, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in error.

474 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Certificate.

I hereby certify that in the above entitled cause wherein Portland Railway Light and Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent and the question before the above entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the 30th day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway Light and Power Company claims that said order as amended deprived it of its property without due process of law and that it violated the obligation of a contract in which said Portland Railway Light and Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the constitution of the United States

of America, and that the decision of the above entitled court was against said Portland Railway Light and Power Company and said constitutional questions claimed by said Portland Railway Light and Power Company and that such decision was necessary to the decree rendered in the above entitled cause.

Dated the 13th day of June, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

475 [Endorsed:] No. 6967. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Certificate of Federal Question. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman and Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Appellant.

476 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Portland Railway Light and Power Company, a corporation, Plaintiff, v. Oregon Railroad Commission, Defendant, and also of the opinion of the court rendered therein and the decree entered thereon. That the transcript herein contains the Original Assignments of Error, Petition for Writ of Error, and Order Allowing same, a copy of the bond on appeal to the U. S. Supreme Court, the Original Writ of Error, Citation and Certificate as to Federal Questions.

I further certify that the exhibits attached hereto are the original exhibits introduced in evidence and filed in this court in this cause.

In testimony where-, I have hereunto set my hand — affixed the seal of said court at my office in Salem, Oregon, this 1st day of August, 1910.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

477 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the

seal of the said Supreme Court of Oregon, in the city of Salem, this 1st day of August, 1910.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

Costs.

Costs of Transcript $237.00 paid by the Portland Railway Light & Power Co. this 1st day of August, 1910.

478 In the Supreme Court of the State of Oregon.

Case No. 6967.
" " 6968.

PORTLAND RAILWAY LIGHT AND POWER CO., Plaintiff,
vs.
OREGON RAILROAD COMMISSION, Defendant.

It is hereby stipulated between the attorneys of the respective parties hereto that the original exhibits on file in this cause may be used by the Clerk of the Supreme Court in preparing the transcript on appeal to the United States Supreme Court, in lieu of copies thereof, and the same to be transmitted to the Clerk of the U. S. Supreme Court as part of the record on appeal.

FRED'K V. HOLMAN,
Attorney for Plaintiff.
A. M. CRAWFORD,
Attorney for Defendant.

Dated this 30th day of July, 1910.

Based upon the foregoing stipulation it is ordered that the original exhibits herein be transmitted to the U. S. Supreme Court as part of the transcript on appeal.

F. A. MOORE,
Chief Justice.

Dated Aug. 2, 1910.

Filed Aug. 2, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

479 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

It is hereby stipulated between the attorneys of the respective parties that the original exhibits on file in the above entitled cause known in the Supreme Court of the State of Oregon as Milwaukee case, No. 6967, and also in the cause of the same title known as Oak Grove case, No. 6968, may be used by the Clerk of the Supreme Court of Oregon in preparing transcripts on writs of error to the United States Supreme Court in said two causes in lieu of copies thereof, and the same to be transmitted to the Clerk of the United States Supreme Court as a part of the records on such writs of error.

It is further stipulated that said original exhibits may be considered in each of said cases as exhibits in each thereof.

It is further stipulated that this stipulation may be attached to the transcripts in said two causes after the same are filed in the United States Supreme Court.

Dated this Fourth day of August, 1910.

FRED'K V. HOLMAN,
Attorney for Plaintiff in Error.
A. M. CRAWFORD,
Attorney for Defendant in Error.

Based on the foregoing stipulation, It is ordered that the original exhibits herein be transmitted to the United States Supreme Court as part of the transcripts on writs of error in the two cases mentioned in said stipulation, and that the foregoing stipulation and this order may be filed in the Supreme Court of the United States.

Dated August 4, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

480 [Endorsed:] No. —. In the Supreme Court of the United States. Portland Railway, Light and Power Company, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Stipulation as to Original Exhibits. Filed —— —, 189–. —— ——, Clerk, by —— ——, Deputy. Frederick V. Holman, Attorney for Pl't'ff in Error; A. M. Crawford, Attorney for Def't in Error.

Endorsed on cover: File No. 22,293. Oregon Supreme Court. Term No. 119. Portland Railway Light and Power Company, plaintiff in error, vs. Railroad Commission of Oregon. Filed August 11th, 1910. File No. 22,293.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 120.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 11, 1919.

(22,264)

(22,294)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 120.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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1 & 2 In the Supreme Court of the United States.

Oak Grove Case, No. 6968.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

Appeal from the Supreme Court of the State of Oregon.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff in Error;
A. M. Crawford, Attorney General, Clyde B. Aitchison, and Giltner & Sewall, for Defendant in Error.

3 & 4 *Transcript.*

Case No. 6968, Drawer No. 652.

Oak Grove Case.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

Appeal from the Honorable Circuit Court of Marion County.

Hon. Wm. Galloway, Judge.

Frederick V. Holman and Franklin T. Griffith, Attorneys for Plaintiff and Appellant.
A. M. Crawford, Attorney General; Clyde B. Aitchison and Giltner & Sewall, Attorneys for Defendant and Respondent.

5 Be it remembered, that heretofore, on the 27th day of February, 1908, there was filed in the office of the clerk of the circuit court of the State of Oregon in and for the County of Marion, a

Complaint

in words and figures as follows:

6 In the Circuit Court of the State of Oregon for the County of Marion.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

Complaint.

Comes now the plaintiff above named and for cause of suit against the above named defendant alleges:

I.

That plaintiff is now and at all times since the 28th day of October, 1907, hereinafter referred to, has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having its principal office and place of business at the City of Portland, Oregon, and during all of said times has been and is now engaged in operating street railways within the said City of Portland and railroads without the said City of Portland in Multnomah and Clackamas Counties, State of Oregon, and during all of said time has been and is now engaged in the enterprise and business of transportation of passengers as a common carrier over lines of railway with termini as follows:

(*a*) From the City of Portland, in the County of Multnomah, State of Oregon, in a general southeasterly direction to section 3 township 4 south of range 4 east of Willamette meridian in the County of Clackamas in said state, which line is known and hereinafter referred to as the "Springwater Division."

(*b*) From the said City of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Wil-amette River about one mile south of Oregon City in said County of Clackamas, which line is known and hereinafter referred to as the "Oregon City Division."

(*c*) From the said City of Portland in a general easterly and northeasterly direction to and through the said village of Lents, to Lents Junction on the line of railway first above mentioned,
7 in said County of Multnomah, which line is known and hereinafter referred to as the "Mt. Scott Division."

(*d*) From a point on the line of railway first above mentioned near the town of Cedarville in section 17 township 1 south of range 3 east of Willamette meridian in a general northerly and northeasterly direction to and through the village of Troutdale in said County of Multnomah to the Columbia River opposite Lady's Island, which line is known and herein referred to as the "Troutdale Division."

II.

That by reason of the facts, circumstances and conditions hereinafter fully set forth, plaintiff has established certain reasonable

rates of fare for the transportation of persons traveling as passengers upon its said lines of railway and between different points on its said railways and its said terminus at First and Alder Streets in said City of Portland and between Golf Junction to the places and points named below, the following rates, fares and charges, the distances being as set forth below.

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 miles	5 cents.
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

8 Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5 cents.
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 cents.
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

III.

That plaintiff's "Oregon City Division" extends from its terminus on First and Alder Streets in Portland to and through Golf Junction on the southern boundary line of Portland and thence in a general southerly direction to Oregon City and Canemah; and that plaintiff's "Springwater Division" extends from said terminus in Portland to and through said Golf Junction and thence in a general easterly direction to and through Lents Junction and thence in a general southeasterly direction to Cazadero; and that plaintiff's "Mt. Scott Division" extends from said terminus in Portland in a general easterly and northeasterly direction, not passing through or near said Golf Junction, to and through Lents and thence in the same direction to said Lents Junction.

IV.

That plaintiff operates its cars of and from all of its said divisions within the corporate limits of the City of Portland under franchises by the terms and provisions of which it is prohibited from charging any passenger more than five cents for any one continuous ride in any one general direction on any of said cars; and that as said City of Portland has a population exceeding 50,000 inhabitants, this plaintiff is also prohibited by Section 2096 of Bellinger and
9 Cotton's Annotated Codes and Statutes of Oregon from Charging any passenger more than five cents for a continuous ride in one general direction in said city.

V.

That plaintiff charges a fare of 25¢ for a ride from its said terminus in Portland to Oregon City, a distance of 14.47 miles and that said fare is approximately at the rate of 2 cents per mile.

VI.

That because of the facts set forth in paragraph IV of this complaint, plaintiff cannot, on or for any ride on its "Oregon City Division," charge at the rate of 2 cents per mile or charge more than five cents in all for the 5.36 miles from its said terminus on First and

Alder Streets and Golf Junction as all of said 5.36 miles is within the said City of Portland; and that because it is not practical or convenient to collect fares on said Division other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed the remaining 20 cents of the 25 cent fare from Portland to Oregon City by dividing the remaining 9.11 miles of the total mileage between said cities into four districts and applying to all points within each district a group rate of five cents more than the fare to points within the next district on the north, thus: (*a*) The first district includes Lambert, Knight, Hendee, Milwaukee and Island and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 10 cents and from Golf Junction five cents less; (*b*) the second district includes Milwaukee Heights, Courtney, Oak Grove, Center and Risley and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; (*c*) the third district includes all stations from and including Concord to and including Clackamas Bridge and the group rate applied to said district and the fare for and rate to each station in said district from Portland is twenty cents and from Golf Junction five cents less; and (*d*) the fourth district includes Park Place and Oregon City and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 25 cents and from Golf Junction five cents less.

VII.

That though the fare charged by plaintiff for one ride from Portland to the places included in said second district on said "Oregon City Division" is fifteen cents, plaintiff has established commutation rates to said places and sells commutation books to each of said places, containing twenty coupons, each of which entitles the bearer to a ride to or from Portland, at the following rates: $1.50 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center and $2.00 for Risley.

VIII.

That Golf Junction on the southern boundary of Portland is the junction of plaintiff's "Oregon City Division" and "Springwater Divisions," and from that point to its terminus on First and Alder Streets in Portland, plaintiff's cars of and from both divisions run over the same tracks; and that plaintiff's "Oregon City Division" extends south from Golf Junction, and on trips to or in the direction of Oregon City its cars thereon are out of Portland after leaving Golf Junction; and that plaintiff's "Springwater Division" proceeds in an easterly direction from Golf Junction, and on a trip to or in the direction of Cazadero its cars on said division remain within the corporate limits of Portland for nearly a mile after leaving Golf Junction; and that the station of Nickum is the first station on said "Springwater Division" east of Golf Junction and is only about one-half mile east of the eastern boundary of Portland; and that on said

"Springwater Division" plaintiff runs regular trains which stop for the taking on and letting off of passengers only at stations, and that as there is no station on said division between Golf Junction and Nickum and the former is within Portland and the latter but a short distance out of Portland and passengers are entitled to and can insist upon being carried to the boundary of Portland for five cents and it would be decidedly inconvenient and unnecessarily expensive and to the detriment of the service for plaintiff to stop all its trains at said boundary, plaintiff has extended the five cent fare limit on said division to Nickum as the first station outside of Portland.

11

IX.

That the circumstances and conditions at and about and the service to Nickum are not like or similar to or contemporaneous with the circumstances and conditions at and about the service to the places included in said second district of said "Oregon City Division"; and that the fare charged by plaintiff from Portland to Nickum on said "Springwater Division" does not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff from Portland to the places within said second district for the purpose of determining whether or not the latter are just or reasonable or justly or unjustly discriminatory.

X.

That plaintiff's "Mt. Scott Division" consists of a line of railway running from its said terminus on First and Alder Streets in Portland to Mt. Tabor Junction at about the intersection of Hawthorn Avenue and East Fort*h*-eighth Street in Portland, and then in a general southeasterly direction to Lents in Multnomah County, and then a distance of .62 of a mile to a junction with said "Springwater Division" at a point known as Lents Junction; and that though it is 10.71 miles from Portland to Lents Junction by the "Springwater Division", it is only 8.31 miles from Portland to Lents Junction by the "Mt. Scott Division"; and that the said "Mt. Scott Division" to a point about one mile southeasterly from Mt. Tabor Junction and about 3 miles northwesterly from Lents is wholly within the corporate limits of Portland.

XI.

That the right of way and track and road from Mt. Tabor Junction to Lents were first acquired and constructed by the Portland, Chicago and Mt. Scott Railway Company, a corporation whose stock was principally owned by those who lived or owned property at and between said points; and that plaintiff's predecessor acquired said stock and said right of way and track and road and railway between Mt. Tabor Junction and Lents from the said stockholders and owners under an arrangement and agreement by which, for a valuable consideration, it expressly agreed that no more than a

12 5 cent fare should be charged by plaintiff's predecessor and its successors and assigns for any ride between Lents and

Portland; and that plaintiff is bound by said arrangement and agreement, and by reason thereof cannot charge more than 5 cents for any ride on said "Mt. Scott Division" between Lents and Portland.

XII.

That said "Mt. Scott Division" was extended from Lents to Lents Junction a distance of .62 of a mile, for the benefit and accommodation of the public generally, and particularly that portion thereof residing or being on or near the "Mt. Scott Division" who would desire to go to points on the "Springwater Division" and that portion thereof residing or being on or near the "Springwater Division" would *would* desire to go to points on the "Mt. Scott Division"; and that the 5 cent fare limit on or via the "Mt. Scott Division" was and is stopped at Lents; and that plaintiff could not and cannot charge more than 5 cents for a ride over or via said "Mt. Scott Division" from Lents to Lents Junction or to points within a reasonable distance beyond said Lents Junction on the "Springwater Division."

XIII.

That because of the facts and conditions set forth in the three preceding paragraphs hereof and the situation and conditions of plaintiff's lines and traffic generally, plaintiff cannot charge for a ride from Portland to Lents Junction over the "Springwater Division" more than ten cents—that being the fare it must charge for a ride between said points on the "Mt. Scott Division"; and that it necessarily follows that plaintiff cannot charge more than ten cents for a ride on the "Springwater Division" from Portland to any point between Portland and Lents Junction, for which reasons the fare from Portland to all points between Nickum and Lents Junction is only ten cents.

XIV.

That there is considerable travel between points beyond Lents Junction on the "Springwater Division" and Lents and points between Lents and Portland on the "Mt. Scott Division", such travel transferring from one to the other division at Lents Junction; and that, if more than five cent fare was charged between Lents
13 and any and all points on the "Springwater Division" beyond Lents Junction regardless of their distances beyond Lents Junction, it would result in a division of only .62 of a mile from Lents to Lents Junction for and on which a five cent fare was charged and in unreasonable and unlawful rates from some points beyond Lents Junction to Lents; and that it therefore became necessary to create a district extending from Lents on the "Mt. Scott Division" to Gates on the "Springwater Division", a distance of 2.29 miles and to establish and apply a group rate of ten cents for the fare from Portland via Lents to each station in that district on the "Springwater Division" to-wit: Lents Junction, Gilbert and Gates,—Gates being only 1.67 miles beyond Lents Junction; and that, as it is so became necessary to establish a 10 cent rate from

Portland to Gilbert and to Gates via Lents and the "Mt. Scott Division", plaintiff had to also fix its fare from Portland to Gilbert and to Gates over the "Springwater Division" at 10 cents.

XV.

That the total distance from Portland to Cazadero over the "Springwater Division" is 37.51 miles and the fare charged by plaintiff for the ride from Portland to Cazadero is 80 cents or approximately two cents per mile; and that because of the facts set forth in the preceding paragraphs of this complaint, plaintiff cannot and does not charge more than ten cents for that portion of said ride from Portland to Cazadero which ends at Gates; and that the distance from Gates to Cazadero is 25.23 miles and the remaining 70 cents of the total fare from Portland to Cazadero should be equitably distributed over said 25.23 miles; and that, because it is not practical or convenient to collect fares on the "Springwater Division" other than in multiples of five cents, plaintiff has, for the purpose of maintaining fair and just rates throughout said division, distributed said remaining 70 cents of said 80 cent fare from Portland to Cazadero by dividing said remaining 25.23 miles of the total mileage between said points—being the distance from Gates to Cazadero—into fourteen districts and applied to all points within each district a group rate of 5 cents more than the fare to points within the next district nearer Portland, and that, as a matter of fact, these group
14 rate districts on the "Springwater Division" are approximately only 1.81 miles in length, while the group rate districts on the "Oregon City Division" are approximately 2.27 miles in length —showing that, as a whole, lesser fares are charged to intermediate points on the "Oregon City Division" than on the "Springwater Division"—the difference in this regard being due to the difference in the situation and circumstances and conditions of the two divisions as hereinbefore shown and explained; and that the first of said districts on said "Springwater Division" beyond Gates includes the stations of Wilson, Sycamore and Jenne and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction five cents less; and that the second of said districts on said "Springwater Division" beyond Gates includes the stations of Meadowbrook and Cedarville and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction five cents less; and that in like manner the group rate applied to each of said districts and the fare for and rate to each station in said district from Portland and from Golf Junction increases five cents as each district is reached on the way to Cazadero.

XVI.

That the situation of and the circumstances and conditions governing and controlling the traffic and service upon plaintiff's said "Springwater Division" and said "Mt. Scott Division" are not like or similar to or contemporaneous with the situation of and the cir-

cumstances and conditions governing and controlling the traffic and service upon plaintiff's "Oregon City Division"; and that the fares charged by plaintiff on its said "Springwater Division" and on its said "Mt. Scott Division" do not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by plaintiff on its "Oregon City Division" for the purpose of determining whether or not any of the latter are just or reasonable or justly or unjustly discriminatory.

XVII.

15 That the fares charged by plaintiff on all of its said divisions are fair and reasonable and just and in and by none of them is any provision of Chapter 53 of the Session Laws of Oregon for 1907 violated.

XVIII.

That heretofore and on the 30th day of January, 1908, the defendant rendered an order and decision which was thereafter and on the 1st day of February, 1908, served upon plaintiff, upon the application of the Oak Grove Improvement Association, by B. Lee Paget, as Relator and against this plaintiff wherein and whereby, notwithstanding all of the facts and circumstances hereinbefore set forth, the said defendant found and declared that the rates, fares and charges demanded and collected by this plaintiff of and from persons traveling in either direction between Lents and Lents Junction, and First and Alder Streets in the City of Portland on the "Mt. Scott Division" and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and the said First and Alder Streets on the said "Springwater Division" are unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets and that the practice of this plaintiff in issuing transfers to certain passengers on certain of plaintiff's lines of railway and the refusal of plaintiff to furnish such transfers to the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over plaintiff's lines of railroad to First and Alder Street- in the City of Portland, Oregon, is unreasonable and unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the relator, B. Lee Paget, and also that the said fares and charges of plaintiff between the group of stations including Milwaukee Heights, Oak Grove, Center and Risley and the terminus of said railroad at First and Alder Streets in the City of Portland, to-wit: the sum of fifteen cents for a single passage in either direction, is in itself unjust and unreasonable and

16 that a just and reasonable fare and charge for the transportation of persons in either direction between said First and Alder Streets in the City of Portland and said points within the said group would be the sum of ten cents and thereupon said

defendant ordered and directed this plaintiff to cease charging the said rate of 15 cents and directed this plaintiff to charge for such transportation of each passenger the sum of ten cents only and further directed this plaintiff to afford the same transfer privileges to passengers from said group including Milwaukee Heights, Courtney, Oak Grove, Center and Risley to First and Alder Streets in the City of Portland, in either direction which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland and further require this plaintiff to observe and follow the rates and practice in regard to transfers in said order prescribed by said defendant and to make such change in said charges and said practice within thirty days from the date of the service of a certified copy of said order upon plaintiff.

XIX.

That a copy of said order of said defendant is hereunto attached marked "Exhibit A" and is hereby referred to and expressly made a part of this complaint.

XX.

That the rates, charges and practice of this plaintiff which said defendant in and by the said order declares to be unjust, unreasonable and unjustly discriminatory, are as a matter of fact, reasonable and fair and are not unjustly discriminatory in respect to said Oak Grove Improvement Association, and the members thereof, and the said Relator, B. Lee Paget, or any other persons traveling as passengers upon said "Oregon City Division" of said plaintiff's railway, or any part thereof, nor by reason of the facts, circumstances and conditions in this complaint set forth, are said rates and practices unjustly discriminatory in respect to any other persons traveling as passengers upon any other of said plaintiff's lines of railway.

XXI.

That in making the said order, findings and decisions
17 upon the application of said Oak Grove Improvement Association by B. Lee Paget, as Relator, and against this plaintiff, the said defendant has wholly ignored and disregarded the facts, circumstances and conditions and the contractual obligations of this plaintiff which have rendered necessary, proper and reasonable the establishment of the said rates hereinbefore set forth upon the said "Mt. Scott Division" and the said "Springwater Division" and because this plaintiff has been and is compelled by said facts, circumstances, conditions and contractual obligations to transport persons traveling as passengers, a greater distance upon said "Mt. Scott Division" and said "Springwater Division" for a less charge or fare than that established by this plaintiff upon said "Oregon City Division" between the said terminus at First and Alder Streets and the said group of stations including Milwaukee Heights, Courtney, Oak Grove, Center and Risley and not otherwise, said defendant has arbitrarily and unlawfully by its

said order dated January 30, 1908, required and commanded this plaintiff to reduce its just and reasonable charges and fares upon said "Oregon City Division" between said First and Alder Streets and the points upon said "Oregon City Division" last above mentioned.

XXII.

That the said rates, charges and tolls fixed and established and charged and collected by this plaintiff for persons traveling as passengers between said group of stations last above mentioned and said First and Alder Streets are reasonable and such only as, considering the volume of the traffic and the expense of maintenance and operation of plaintiff's railroads to afford a reasonable return upon plaintiff's investment in said railroad.

18

XXIII.

That the rates, fares and charges to be charged and collected by this plaintiff for the transportation of passengers between the points described in the said order of the defendant, fixed in said order, are unreasonable and unlawful and that if permitted to go into effect would deprive plaintiff of a just and reasonable or any net profit or return upon the transportation of passengers traveling over the portions of said plaintiff's railroad affected by said order of said defendant, and that the regulations and practice prescribed and fixed in said order of said defendant to be followed and observed by this plaintiff, are and each of them are unreasonable.

XXIV.

That in making the said order and decision aforesaid, the said defendant has exceeded the powers conferred upon it by the Act of the Legislature of Oregon creating the said defendant and which act is known as Chapter 53 of the general laws of Oregon, Session of 1907, in that said defendant in making said order has found and based the said order upon the finding of said defendant, and that the said rates of fare charged and collected by plaintiff from different points on different and separate lines of plaintiff's railways are unjustly discriminatory against the said Oak Grove Improvement Association and the members thereof, and the Relator B. Lee Paget, who travel to said plaintiff's terminal at First and Alder Streets in Portland from other points and upon an entirely different and separate line of plaintiff's said railways.

XXV.

That to permit the said order and decision of the said defendant to go into effect would unjustly and seriously impair the revenues of this plaintiff and would result in great and irreparable damage and injury to this plaintiff.

19

XXVI.

That plaintiff has no plain, speedy or adequate remedy at law.

XXVII.

That should this Honorable Court after a full hearing upon the issues raised in this cause render a decision herein enjoining the taking effect of the said order of the said defendant or any part thereof, that in the interim between the filing of this complaint and the rendering of such decree, this plaintiff would be required to charge only the rates and fares fixed in and by the said order of the said defendant and that by reason of the great number of passengers that would be transported by plaintiff on said railway between the points thereon affected by said order and by reason of the provisions of said Chapter 53 of the general laws of Oregon, Session 1907, it would be impossible for this plaintiff to recover of and from the persons traveling as passengers upon its said line of railway, affected by the said order, the said five cents per passenger which is the reduction in fare fixed by said defendant and which would result in great and irreparable damage and injury to this plaintiff.

Wherefore, plaintiff prays that a temporary restraining order be issued out of this court directed to the said defendant suspending and staying the operations of the said order of the said defendant until such time as a final hearing and determination of this cause can be had and that upon such final hearing plaintiff be granted a decree herein vacating and setting aside the said order of the said defendant; that plaintiff have such other, further or different relief as to the court may seem meet and equitable and that plaintiff have and recover of and from defendant its costs and disbursements herein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

20 STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn say that I am Vice President of the Portland Railway Light and Power Company, plaintiff named in the above entitled suit, that I have read the foregoing complaint and that the same is true as I verily believe.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.]

C. A. MANEY,
Notary Public for Oregon.

21 "EXHIBIT A."

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGE, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Oregon.

Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the argument of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and own- and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the line of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

22 (3) That the defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	.... 5 cents.
Lambert	5.93 "	....10 "
Knight	6.29 "	....10 "
Hendee	6.44 "	....10 "
Milwaukee	6.71 "	....10 "
Island	7.05 "	....10 "
Milwaukee Heights	7.70 "	....15 "
Courtney	8.30 "	....15 "
Oak Grove	8.48 "	....15 "
Center	8.68 "	....15 "
Risley	9.26 "	....15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 miles	5 cents.
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5 cents.
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15 miles	5 cents.
Kerrigan	1.90 "	5 "
Bell	3.15 "	5 "
Kendall	3.96 "	5 "
Lents Junction	5.35 "	5 "
Gilbert	6.29 "	10 "
Gates	7.02 "	10 "
Wilson	7.64 "	10 "
Sycamore	8.12 "	10 "
Jenne	9.07 "	10 "

23 (4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction,

Gilbert and Gates and the said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the Relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the City of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of fifteen cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and said points would be the sum of ten cents.

It is therefore ordered, considered and determined, that the
24 said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in

lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the defendant continuing to offer to the traveling public the 20 ride commutation rates scheduled on Page 4 of its Tariff O. R. C. No. 1, and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintiff to move for a re-hearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL, *Secretary.*

A true copy:
[SEAL.] GEO. O. GOODALL, *Secretary.*

And afterward, on the 27th day of February, 1908, the following

Summons

was duly filed in the office of the said clerk:

(Title.)

To Railroad Commission of Oregon, Defendant:

In the name of the State of Oregon: you are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of service of this summons upon you, if served within this County; and if you fail to answer, for want thereof, the plaintiff will apply to the court for a decree as prayed for in the complaint, vacating and setting aside that certain order made by the defendant on the 30th day of January, 1908, on the application of the Oak Grove Improvement Association by B. Lee Paget as Relator, plaintiff, and against Portland Railway Light and Power Company, defendant, and the whole thereof, which said order of the said defendant provides as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak

Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that
27 the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.";

and for such other, further or different relief as to the court may seem meet and equitable in the premises and for judgment against you for plaintiff's costs and disbursements in the said suit.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

On which summons was made the following return:

STATE OF OREGON,
County of Marion, ss:

I hereby certify that I served the within summons within the said State and County, on the 27th day of February, 1908, on the within named defendant, Railroad Commission of Oregon, by delivering a copy thereof, prepared and certified by me, as Sheriff, together with a copy of the complaint, prepared and certified to by Franklin T. Griffith, one of plaintiff's attorneys, to Geo. O. Goodall, Secretary of said Railroad Commission.

W. J. CULVER,
Sheriff of Marion County, State of Oregon,
By H. P. MINTO, *Dep'ty.*

28 And afterward, on the 28th day of February, 1908, there was duly made and entered of record, an

Order Direction Notice of Hearing on Application for Injunction

in words and figures as follows:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock, P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to make in the premises, and show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center
29 and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded to passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this

order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

Dated Feb. 27, 1908.

30 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, a

Motion for Temporary Injunction and Order Fixing Time of Hearing,

in words and figures as follows, viz:

(Title.)

To Railroad Commission of Oregon, defendant above named:

Take notice that the above named plaintiff will, on Monday, the second day of March, 1908, at the hour of one o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, will present the hereunto attached motion and will move the above entitled court for a temporary injunction as prayed for therein.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

It is hereby ordered that the foregoing notice be served upon the defendant not less than two days prior to the said second day of March, 1908.

WM. GALLOWAY,
Judge of the Circuit Court of the State of Oregon for the County of Marion.

31 *Motion.*

(Title.)

Comes now the plaintiff above named by Frederick V. Holman and Franklin T. Griffith, its attorneys and, based upon the affidavit of F. I. Fuller hereunto attached and the complaint of plaintiff on file herein, moves the court to grant a temporary injunction herein

suspending and staying the operation of that certain order and decision of the defendant dated the 30th day of January, 1908, and fully set forth and described in plaintiff's complaint and the whole thereof until the final determination of the above entitled cause.

FREDERICK V. HOLMAN &
FRANKLIN T. GRIFFITH,
Attorneys for Plaintiff.

To which was attached the following

Affidavit.

(Title.)

STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn, say that I am Vice President of Portland Railway Light and Power Company, plaintiff in the above entitled suit; that heretofore and on the 30th day of January, 1908, the defendant made and thereafter served upon the said plaintiff a certain order and decision of said defendant commanding and requiring this plaintiff, within thirty days from the service of said order upon this plaintiff, to reduce the rates of fare charged and collected by this plaintiff from persons traveling as passengers upon the line of railway of this plaintiff known as plaintiff's Oregon City Division, which order and decision commands and requires this plaintiff, after the expiration of said thirty days, to charge and collect a fare of — cents only from each person traveling as a passenger upon this plaintiff's said Oregon City Division between stations on said division known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley to — the terminus of
32 plaintiff's Oregon City Division of railway at First and Alder Streets in the City of Portland, Oregon, whereas the rates of fare heretofore and now charged and collected by this plaintiff of and from persons traveling as passengers upon said Oregon City Division between the said points has been and is the sum of fifteen cents.

That said order and decision of said defendant further requires and commands this plaintiff, within said period of thirty days, to furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

That this plaintiff has commenced in the above entitled court a suit against the said defendant for the purpose of setting aside and vacating the said order and decision of the said defendant for the reasons and upon the grounds that the said order and decision is unlawful and unreasonable as fully set forth in plaintiff's said complaint.

That the said order and decision of the said defendant was served upon this plaintiff on the 1st day of February, 1908, and, unless

stayed and suspended by order of this Honorable Court, will go into effect on the 2d day of March, 1908.

That should the said order and decision of the said defendant be permitted to go into effect the said plaintiff will thereafter and until the final determination of the said suit be required to reduce its charges for said transportation and will be required to issue the said transfers as required by the said order and decision, and that should the said order and decision, at the final hearing of the said suit, be vacated and set aside this plaintiff will be unable to recover of and from the persons traveling as passengers upon its said line of railroad and paying said reduced fare, the additional fare to which plaintiff is entitled, and that all of such additional fare would be wholly lost to said plaintiff to its great and irreparable damage and injury.

That it is provided by Chapter 53 of the General Laws of Oregon, Session 1907, that should a temporary injunction be issued
33 suspending or staying the operation of any such order of the said defendant that all persons traveling as passengers upon plaintiff's line of railway during the pendency of such suit and the continuance of such temporary injunction can recover in an action at law, as in Chapter 53 provided, the excess fare so paid and that no damage or injury would be sustained by any of such persons traveling as such passengers by reason of such temporary injunction.

F. I. FULLER.

Subscribed and sworn to before me this 26th day of February, 1908.

[SEAL.] C. A. MANEY,
Notary Public for Oregon.

34 To which Motion and Affidavit the following

Order of Court

was duly attached, viz:

(Title.)

Plaintiff in the above entitled cause having presented herein its motion supported by affidavit and based upon said affidavit and the pleadings on file herein and having moved the court for an order setting a time for the hearing of plaintiff's application to the court for the issuance in said cause of a temporary or preliminary injunction as prayed for in the said complaint.

It is ordered that Monday, the second day of March, 1908, at the hour of one o'clock P. M. of said day, at the courtroom of this court in Salem, in said Marion County, be and the same is hereby fixed as the time and place for hearing plaintiff's said application for a temporary injunction, and the defendant is directed to be and appear at said time and place to make such counter showing it may wish to make in the premises, and to show cause why an injunction should not be issued suspending and staying the order of the defendant, dated the 30th day of January, 1908, which is as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and
35 Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered, and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

It is further ordered that plaintiff serve a copy of this order upon the defendant, together with a copy of plaintiff's said motion and the affidavit in support thereof which it may desire to present at said hearing, and that said service be made at least two days prior to said second day of March, 1908, and that at the time or prior to the said time set for hearing of said application the said defendant serve upon plaintiff or its attorneys any counter affidavits it may desire to present to the said application.

WM. GALLOWAY, *Judge.*

STATE OF OREGON,
County of Marion, ss:

Due service of the within order, motion and affidavit is hereby accepted in Marion County, Oregon, this 28 day of February, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith of attorneys for plaintiff.

RAILROAD COMMISSION OF OREGON,
By CLYDE B. AITCHISON, *Commissioner.*

36 And afterward, on the 2d day of March, 1908, the defendant duly filed with the said clerk, an

Answer

in words and figures as follows:

(Title.)

Now comes the defendant above named and for answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

First. Denies each and every allegation of the complaint except as hereinafter expressly admitted.

Second. Admits all of paragraph 1 of the complaint, except the allegation that plaintiff is or has been engaged in operating street railways within the City of Portland and railroads without the City of Portland between the termini set out in subparagraphs lettered "a, b, c, and d," of said paragraph 1; and defendant alleges that the plaintiff, at the time set out in said paragraph 1, was and is engaged in the operation of one continuous system of electric railways, carrying freight, passengers, and express between the termini set out in said paragraph.

Third. Admits that the plaintiff established certain rates of fare for the transportation of persons upon its lines of railway and between the different points on its railway and its terminus, at First and Alder Streets in the City of Portland and between Golf Junction to the places and points named in paragraph 2, and that the rates, fares, and charges established by the plaintiff are set out in said paragraph 2, and that the distances set out in said paragraph 2 are substantially correct, but this defendant denies that the rates, fares and charges so established by the plaintiff are the reasonable rates of fare for the transportation of persons traveling between said points; and this defendant especially denies that the rate of fare established and charged between First and Alder Streets in the City of Portland and Oak Grove and other places and points, to wit: fifteen cents, is a reasonable rate of fare or charge, and alleges that no greater fare than ten cents is a reasonable rate, fare or charge between said points for the transportation of persons traveling as passengers upon plaintiff's said railway lines.

37 Fourth. Admits all of paragraph 3 of the complaint.

Fifth. Admits the allegation in paragraph 4 of the complaint alleging that the City of Portland has a population exceeding fifty thousand inhabitants.

Sixth. Admits all of paragraph 5 of said complaint.

Seventh. Admits that the fares charged by the plaintiff are set out in paragraph 6 of the complaint, but the defendant specifically denies that it is not practicable or convenient to collect fares on said Oregon City Division other than in multiples of five cents, and alleges that on the contrary, it is practicable and convenient to collect fares on said division in multiples of one cent, or any number of cents.

Eighth. Admits that the plaintiff has established commutation rates and established commutation books, as alleged in paragraph 7 of the complaint, but the defendant alleges that no transfers are given to persons riding upon or using said commutation rates for coupons.

Ninth. Admits the allegations of paragraph 8 of the complaint, except that on a trip to or in the direction of Oregon City, its cars thereon are out of Portland after leaving Golf Junction, and that plaintiff's Springwater division proceeds in an easterly direction from Golf Junction and on a trip to or in the direction of Cazadero the cars of said division run in the corporate limits of Portland for nearly a mile after leaving Golf Junction and on the contrary alleges that they only run in the corporate limits for three thousand and thirty-seven (3037) feet, and admits that the station of Nickum is the first station on said Springwater division east of Golf Junction, but denies that it was only about one-half mile east of the eastern boundary of Portland, and on the contrary alleges that it is three thousand and sixty (3060) feet east of the eastern boundary of the City of Portland, and defendant expressly denies that passengers are entitled to and can insist on being carried to the boundary of Portland for five cents from Nickum, or that it would be decidedly inconvenient or unnecessarily expensive, or to the detriment of the service for plaintiff to stop all or any of its trains at said boundary.

38 Tenth. Admits all of paragraph 10 of the complaint.

Eleventh. Admits all of paragraph 11 of the complaint, and affirmatively alleges that the traffic on said Portland-Chicago and Mt. Scott Railway Company's line has so increased that the plaintiff has voluntarily increased the number of trains or cars required in said contract mentioned by the plaintiff in said paragraph from twelve to about fifty cars per day each way, and such increase of trains and cars has been voluntarily made by plaintiff to accommodate the increased traffic upon said portions of the plaintiff's line.

Twelfth. Admits that the fare charged by the plaintiff for the ride from Portland to Cazadero is eighty cents, and that the distances from Portland to Cazadero and from Gates to Cazadero are as alleged in paragraph 15 of the complaint.

Thirteenth. Admits all of paragraph- 18 and 19 of the complaint, including order 94, marked "Exhibit A" and attached to said complaint.

Fourteenth. Admits that on the 30th day of January, 1908, it made the order mentioned in paragraph 21 of said complaint, but denies each and every other allegation thereof, and alleges that in making said order, it made the same upon application of the Oak Grove Improvement Association, by B. Lee Pager, as relator, and that it proceeded as required by the provisions of chapter 53, laws of Oregon for 1907, and that testimony was produced by each party thereto, including the plaintiff herein, and all of the testimony produced by both parties was duly considered and acted upon in making said order, and as required by the provisions of this act, this defendant now causes a certified transcript of all the

proceedings had and testimony taken upon such investigation to be filed herewith with the clerk of this court.

Defendant, further answering the complaint herein, alleges:

First. That instead of unjustly or seriously or at all impairing the revenues of this plaintiff, as alleged in paragraphs 25 and
39 27 of the complaint, that if the said order of defendant is permitted to stand, it will materially add to the revenues of the plaintiff, by reason of increased travel, which would be greatly stimulated by the reduction in fares and the giving of transfers.

Second. That the order of the defendant, set out in plaintiff's complaint and sought to be set aside and suspended herein, is in all respects just and reasonable.

Wherefore, defendant prays that this suit be dismissed, and for costs and disbursements herein.

A. M. CRAWFORD,
Attorney General, and
CLYDE B. AITCHISON,
Attorneys for Defendant.

STATE OF OREGON,
County of Marion, ss:

I, Thomas K. Campbell, being first duly sworn, say that I am Chairman of the Railroad Commission of Oregon in the above entitled cause, and that the facts set forth in the foregoing answer are true, as I verily believe.

THOS. K. CAMPBELL.

Subscribed and sworn to before me this 29th day of February, 1908.

[SEAL.] I. H. VAN WINKLE,
Notary Public for Oregon.

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within answer by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Plaintiff.

40 And afterward, on the 2d day of March, 1908, there was duly filed in the office of the said clerk, an

Appearance Against Motion for Preliminary Injunction

in words and figures as follows:

(Title.)

Now comes the defendant above named and opposes the motion for temporary injunction herein, for the following reasons:

First. That the complaint does not set forth facts sufficient to show that the order or decree appealed from was procured through fraud, surprise, or mistake or by any fault of the opposite party, and shows said order to have been issued by the defendant after a trial, duly had between the plaintiff herein and the Oak Grove Improvement Association, by B. Lee Paget, as relator, or that said order is unlawful, unjust, or unreasonable.

Second. That neither the complaint nor the affidavits filed by plaintiff disclose any facts which call for the issuance of a preliminary injunction.

Third. That the pleadings taken together, show that the plaintiff is estopped from demanding a preliminary injunction.

Fourth. That all alleged equities in the complaint are denied by the answer.

Dated this 2d day of March, 1908.

A. M. CRAWFORD, *Att'y General and*
CLYDE B. AITCHISON AND GILTNER &
SEWALL, *Attorneys for Defendant.*

STATE OF OREGON,
County of Marion, ss:

Due and legal service of the within notice of appearance by the receipt of a copy thereof duly prepared and certified by A. M. Crawford, one of the attorneys for defendant, is hereby admitted in said County and State, this 2d day of March, 1908.

FRANKLIN T. GRIFFITH,
Of Attorneys for Pl'ff.

41 And afterwards, on the 3d day of March, 1908, the following

Order on Injunction

was duly allowed by the court:

(Title.)

This matter coming on to be heard this second day of March, 1908, plaintiff appearing by Franklin T. Griffith, Esq., counsel, and the defendant appearing by A. M. Crawford, Attorney General, Giltner and Sewall and C. B. Aitchison, its attorneys, and the Court having heard the motion of plaintiff for a temporary injunction herein and the argument of counsel for the parties and being satisfied from the affidavits presented on behalf of the plaintiff and the pleadings in said cause that the said motion for a temporary injunction should be allowed,

Now, therefore, it is ordered, that said motion for a temporary injunction be and the same is hereby allowed and that the operation of the order of said defendant dated the 30th day of January, 1908, wherein said defendant ordered and required the said plaintiff to

desist in certain practices and to put in effect certain rates in said order specified, which are as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the rates, fares and charges set out in its Tariff O. R. C. No. 1 viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City
42 of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendan*d* shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

be stayed and suspended until the final determination of this cause herein upon condition that the said plaintiff shall make and execute a bond herein in the sum of Five Thousand Dollars as by law required in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such case made and provided, to be approved by this court.

And it is further ordered that from and after filing and the approval of said bond as aforesaid the operation of said order of the said Commission be and the same is hereby suspended and stayed until the final determination of the said cause in this court.

And it is further ordered that within five days from the date hereof the said Portland Railway Light and Power Company shall commence and thereafter continue during the term of said temporary injunction to issue to each person traveling as a passenger upon its said Oregon City Division between the stations of Milwaukee
43 Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either

direction and paying a cash fare therefor of fifteen cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said Portland Railway Light and Power Company should it be determined in this cause that said temporary injunction has been wrongfully issued.

Dated this second day of March, 1908.

WM. GALLOWAY, *Judge.*

43½ And afterward, on the 3d day of March, 1908, the said plaintiff duly filed with the said clerk, its

Undertaking on Injunction

in words and figures as follows:

(Title.)

Whereas, the above named plaintiff has commenced a suit in the Circuit Court of the State of Oregon in and for Marion County, against the above named defendant and is about to apply for an injunction in said suit against said defendant enjoining and restraining it from the commission of certain acts, as in the complaint filed in the said suit, is more particularly set forth and described, and suspended and staying that certain order of said defendant dated the 30th day of January, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore ordered, considered and determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder

44 Streets in the City of Portland, Oregon, in either direction.

"It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future

in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this company as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Now, therefore, we, Portland Railway Light and Power Company as principal, and American Surety Company of New York as surety in consideration of the premises, and of the issuing of said injunction do jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said injunction shall issue, the said plaintiff shall pay all costs and disbursements that may be decreed to the defendant and also the said Portland Railway Light and Power Company shall answer for all damages caused by the delay in the enforcement of the said order of the defendant and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the said defendant had not been suspended during the period transpiring from the issuance of said injunction until the final determination of the questions litigated in said suit not exceeding the sum of Five Thousand Dollars as it or they may sustain by reason of the said injunction, if the same be wrongfully — or without sufficient cause.

Dated this 2d day of March, 1908.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,

45 By FRANKLIN T. GRIFFITH,
Its Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOMER H. SMITH,

[SEAL.] *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Ass't Secretary.

STATE OF OREGON,
County of Marion, ss:

Due service of the within undertaking is hereby admitted in said County and State this 2d day of March, 1908, by receiving a copy thereof duly certified as such by Franklin T. Griffith, of attorneys for plaintiff.

A. M. CRAWFORD,
Attorney for Defendant.

Approved: March 2, 1908.
WM. GALLOWAY, *Judge.*

46 And afterward, on the 22d day of June, 1908, the Court duly rendered its

Findings of Fact and Conclusions of Law

(Title.)

This suit was regularly tried before the court, and it was stipulated by and between the respective attorneys herein that the two cases, one known as the "Milwaukee Case," Number 8962, and one known as the "Oak Grove Case, Number 8963, both entitled as aforesaid, should be tried together, and that the testimony so taken shall be used and considered in both cases; and that the testimony taken in both cases before the Railroad Commission of Oregon should be used and considered in both of the said suits, so far as applicable, and subject to objections.

Frederick V. Holman and Franklin T. Griffith appeared as attorneys for the plaintiff, and Hon. A. M. Crawford, Attorney General of the State of Oregon, Clyde B. Aitchison, and Giltner and Sewall appeared as attorneys for the defendant in the above entitled suit.

Additional evidence to that taken before the said Commission was taken in both cases in the above entitled suit. After the conclusion of the testimony, pursuant to an order of the Court, duly made and entered, the said testimony was referred back to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907. Thereafter, as provided by law, the said Commission, after considering all the evidence in this suit and the argument of the respective counsel, amended its former order and returned the same together with the transcript of the evidence, papers and exhibits, to this Court.

After hearing all the evidence in this suit, the arguments of the respective counsel, and being fully advised in the premises, now at this time the Court makes these, its Findings of Fact and Conclusions of Law, and files the same in this court.

Findings of Fact.

1.

47 That the plaintiff Portland Railway Light & Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, known as the "Oregon City Division," and also a line of railroad from said First and Alder Streets to Lents and Lents Junction, Multnomah County, Oregon, known as the "Mount Scott Division," and also a

line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Nickum, Gates and Cazadero, in Clackamas County, Oregon, said Nickum, Gates and Lents being points outside of the City of Portland, Oregon.

2.

That the defendant is the duly appointed, organized and acting Railroad Commission of Oregon, under the provisions of Chapter 53 of the Laws of Oregon for the year 1907.

3.

That the Oak Grove Improvement Association is a voluntary association organized under the laws of the State of Oregon, and that B. Lee Paget it is president. That Oak Grove, Courtney, Center and Risley are unincorporated communities, situated along the line of plaintiff's Oregon City Division, aforesaid.

That the town of Milwaukee is a municipal corporation of the State of Oregon, and is situated on said Oregon City Division, between the communities first named in this finding and First and Alder Streets in the City of Portland. That the said communities of Oak Grove, Courtney, Center and Risley will for convenience be hereafter designated as the Oak Grove District.

4.

That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

That its street cars are operated by electric power within the
48 City of Portland and to the City of St. Johns, Multnomah County, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein; and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

5.

That plaintiff has established rates of fare for the transportation of persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder Streets in said City of Portland, and between Golf Junction and the places and points named below, the following rates, fares and charges being those so established and the distances being as given below:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5	cents.
Lambert	5.93 "	10	"
Knight	6.29 "	10	"
Hendee	6.44 "	10	"
Milwaukee	6.71 "	10	"
Island	7.05 "	10	"
Milwaukee Heights	7.70 "	15	"
Courtney	8.30 "	15	"
Oak Grove	8.48 "	15	"
Center	8.68 "	15	"
Risley	9.26 "	15	"
Oregon City	14.47 "	25	"
Canemah	15.47 "	25	"

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5	"
Lents	7.69 "	5	"
Lents Junction	8.31 "	10	"

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5	"
Nickum	6.51 "	5	"
Kerrigan	7.26 "	10	"
Bell	8.51 "	10	"
Kendall	9.32 "	10	"
Lents Junction	10.71 "	10	"
Gilbert	11.65 "	10	"
Gates	12.38 "	10	"
Wilson	13.00 "	15	"
Sycamore	13.48 "	15	"
Jenne	14.42 "	15	"

49 Between Golf Junction and

On Oregon City Division.

Lambert	.57 miles	5	cents.
Knight	.93 "	5	"
Hendee	1.08 "	5	"
Milwaukee	1.35 "	5	"
Island	1.69 "	5	"
Milwaukee Heights	2.34 "	10	"
Courtney	2.94 "	10	"
Oak Grove	3.12 "	10	"
Center	3.32 "	10	"
Risley	3.90 "	10	"
Oregon City	9.21 "	20	"
Canemah	10.21 "	20	"

On Springwater Division.

Nickum	1.15	"	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
Wilson	7.64	"	10	"
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

6.

That the distance between Lents and the limits of the City of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild, on plaintiff's said Mt. Scott line, is a mile and one half from Lents, and two miles outside the limits of the City of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said Company near First and Alder Streets in the said City of Portland, to the terminus in the City of St. Johns, Oregon, is to-wit: nine miles. The distance from the said terminus in the City of Portland, Oregon, to the city limits of the said city of St. Johns is about seven miles, and from there to the terminus in the said City of St. Johns proper is about two miles.

7.

That the aforesaid places are suburbs of the City of Portland.

8.

That plaintiff's predecessor acquired about four miles of track and right of way which extended between Mt. Tabor Junction and Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration
50 thereof that not more than a five cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and the City of Portland, and that in making its charge of fice cents between Lents and the City of Portland, the plaintiff is carrying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

9.

That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of pas-

sengers between First and Alder Streets in the City of Portland, and Lents, and intermediate points.

10.

That at all times since said Lents contract was entered into the plaintiff and its predecessor companies charged fifteen cents for the transportation of passengers between First and Alder Streets in the City of Portland and the Oak Grove District. That at the time said Lents contract was entered into the territory between and including Risley and Milwaukee had a population of about 2,000; that at the date of said Lents contract said Oak Grove District was growing in population and real estate was increasing in value; that when plaintiff's Springwater division was opened for traffic and the plaintiff fixed its rates of fare to Nickum at five cents, and to all stations from Kerrigan to Gates inclusive at ten cents; that since the said fare of fice cents between Lents and Portland has been in operation and the said fare of five cents from Nickum to Portland and ten cents from Kerrigan to Gates inclusive has been in operation the said rates have been lower than the fares charged to stations in the Oak Grove district aforesaid, and that the
51 effect thereof has been to cause the said Lents and Lents territory to increase in population as aforesaid, and the said land values in said Lents and Lents territory to increase in value as aforesaid, and the growth and population of said Oak Grove district has thereby been stagnated and its business, since such lower fare to said other communities were established has not appreciably increased.

11.

That by reason of the fact that the inhabitants of the Oak Grove district are charged greater fares than the fares charged the inhabitants of Lents, Nickum and stations from Kerrigan to Gates inclusive for transportation between their respective residences and the City of Portland, the inhabitants of the Oak Grove District have paid to the plaintiff large sums of money in the aggregate for transportation from the Oak Grove District in excess of the charges made inhabitants of Lents, Nickum, Kerrigan and Gates, for transportation from said stations to First and Alder Streets in the City of Portland, to the great injury of the said inhabitants of the Oak Grove District; and that a just and reasonable rate, not discriminatory, to be charged persons traveling between First and Alder Streets in the City of Portland and the town of Oak Grove, Oregon, is ten cents.

12.

That the bulk of the inhabitants of the Oak Grove District are employed in the City of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

13.

That the population and territory between the stations of Kerrigan and Gates aforesaid, on the plaintiff's Springwater division, are

substantially the same as the territory and population in the Oak Grove District aforesaid; that the conditions and circum-
52 stances under which the plaintiff transports passengers between First and Alder Streets in the said City of Portland and the stations on its Springwater Division from Kerrigan to Gates inclusive are substantially the same as the circumstances and conditions under which the plaintiff transports passengers from said First and Alder Streets to the stations in the Oak Grove district, except as to the rate of fare charged, and the giving of transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Kerrigan to Gates.

14.

That the tariff on the plaintiff's Springwater division between the stations of Kerrigan to Gates inclusively, and First and Alder Streets, is not as great as the traffic between the stations in the Oak Grove District at said First and Alder Streets. That the plaintiff operates but seven trains per day over its Springwater division through Gates and Kerrigan in either direction.

15.

That from points on the Mt. Scott Division without the City of Portland, and Nickum on the Springwater Division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the City of Portland, and the City of St. Johns, and that such transfers are not furnished to the citizens of the Oak Grove District, traveling and paying fare from the Oak Grove District to said First and Alder Streets.

53

16.

That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City Division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott Divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the Oak Grove District are unjust and unreasonable, discriminatory and give undue preference.

17.

That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income, or expenditures, or profits or loss if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

18.

That because the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff, and because the track between Golf Junction and First and Alder Streets is used in common by several divisions of the plaintiff's line, the Court is therefore unable to find from the evidence the traffic density to or from stations in the Oak Grove district, or on the Oregon City Division or on any of the plaintiff's other divisions.

19.

That on to-wit: January 30th, 1908, the defendant, after
54 due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain order and findings set out as "Exhibit A" attached to the plaintiffs complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that the same is now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment and transcript are hereby made a part of these findings.

Conclusions of Law.

1. That the equities of this suit are with the defendant, and that the plaintiff's complaint should be dismissed.

2. That the practice of the plaintiff in charging, demanding and collecting of and from passengers traveling in either direction between Oak Grove, Courtney, Center and Risley, and First and Alder Streets in the City of Portland, the sum of fifteen cents, while charging passengers traveling in either direction between said First and Alder Streets and Nickum, Kerrigan, Lents, Lents Junction, Bell, Gilbert and Gates the rates of fare hereinbefore set out, are unjustly discriminatory and unjustly preferential as against the inhabitants of the said Oak Grove District, and the locality thereof, and against persons who travel between said Oak Grove District and First and Alder Streets, aforesaid.

3. That the practice of the plaintiff in furnishing to passengers who travel from points on the Mount Scott Division without the City of Portland, to First and Alder Streets in the City of Portland, transfers entitling the said passenger to transportation over the lines of the Portland Railway Company, and in not furnishing the travelers who pay fare from the Oak Grove District to said First and Alder Streets similar transfers, is unreasonable, unjustly discrimina-
tory and unjustly preferential as against the inhabitants of
55 the Oak Grove District, the locality of the Oak Grove District, and persons traveling from First and Alder Streets to the Oak Grove District in either direction.

4. That the existing fare and charge made by the plaintiff for the transportation of passengers between Oak Grove, Courtney, Cen-

ter and Risley and First and Alder Streets in the City of Portland, to-wit: fifteen cents, is unjust and unreasonable, and that a just and reasonable charge for such transportation is ten (10) cents.

5. That the Lents contract relied upon by the plaintiff as justifying the discriminations aforesaid, is not a sufficient excuse or justification for the aforesaid discriminations and preferences against the locality of the Oak Grove District, the inhabitants thereof, and passengers traveling over plaintiff's line between Oak Grove District and First and Alder Streets. That the subject matter of said contract constitutes a part of the facilities incident to the transportation of passengers from the Oak Grove District to First and Alder Streets aforesaid, and the enforcement thereof is in violation of the provisions of Chapter 53, Laws of Oregon for the year 1907, is against public policy and is illegal and void.

6. That the amended order of the defendant complained of is reasonable, just, valid and lawful in all respects.

7. That the defendant should recover of and from the plaintiff the costs and disbursements of this suit.

Dated at Salem, Oregon, this 22d day of June, 1908.

WM. GALLOWAY, *Judge.*

56 That thereafter, and on the said 22d day of June, 1908, the following

Decree

was duly made and entered of record, viz:

(Title.)

Based upon the foregoing findings of fact and conclusions of law and the pleadings and evidence in this cause, the plaintiff appearing by Franklin T. Griffith and Frederick V. Holman, its attorneys, and the defendant appearing by R. R. Giltner, C. B. Aitchison and A. M. Crawford, its attorneys, and the Court being fully advised in the premises, it is considered, adjudged and decreed that the modified order of defendant, being order No. 94, be and the same is hereby adjudged and decreed to be in all things and respects just and reasonable and in accordance with law and in full legal force and effect, and that plaintiff be and hereby is adjudged and decreed in all matters, things and transactions affected thereby, to obey the same in all its terms and conditions and in accordance with the intent and spirit thereof. Said amended order is in words and figures as follows, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Order.

57 Now on this 30th day of January, 1908, this matter comes on before the above named Commission for final determination and order, having heretofore been fully submitted; and the Commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway, Light and Power Company is a corporation organized under and existing by virtue of the laws of the State of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City Division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott Division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater Division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the City of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the lines of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

(3) That the said defendant makes the following charges and collects the following fares, to-wit:

58 Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5 "
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5 "
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.43 "	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57 "	5 "
Knight	.93 "	5 "
Hendee	1.08 "	5 "
Milwaukee	1.35 "	5 "
Island	1.69 "	5 "
Milwaukee Heights	2.34 "	10 "
Courtney	2.94 "	10 "
Oak Grove	3.12 "	10 "
Center	3.32 "	10 "
Risley	3.90 "	10 "

On Springwater Division.

Nickum	1.15	"	.... 5 "
Kerrigan	1.90	"	.... 5 "
Bell	3.15	"	.... 5 "
Kendall	3.96	"	.... 5 "
Lents Junction	5.35	"	.... 5 "
Gilbert	6.29	"	....10 "
Gates	7.02	"	....10 "
Wilson	7.64	"	....10 "
Sycamore	8.12	"	....10 "
Jenne	9.07	"	....10 "

(4) That the said rates, fares and charges demanded and
59 collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the City of Portland, on the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater Division of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the relator B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott Division without the City of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the City of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the relator, B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the City of Portland, Oregon. The Commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the relator, B. Lee Paget.

(6) The Commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove Center and Risley and First and Alder Streets in the City of Portland, Oregon, to-wit: the sum of fifteen cents a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in the City of Portland and said points would be the sum of ten cents.

It is therefore ordered, considered and determined, that the said Portland Railway, Light and Power Company shall cease and desist
60 from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates,

fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents, and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further ordered, considered and determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of five cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further ordered, considered and determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedule on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the defendant continuing to offer to the traveling public the 20 ride commutation rates scheduled on Page 4 of its Tariff O. R. C. No. 1,
61 and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintiff to move for a rehearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

Attest:

GEO. O. GOODALL,
Secretary.

[Seal of Commission.]

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

vs.

THE PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

Now on this 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the Laws of Oregon for the year 1907.

The plaintiff appears by Giltner and Sewall, its attorneys, and the defendant appears by Fred'k V. Holman and Franklin T. Griffith, its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

62 First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

Second, by adding to Paragraph 5 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of this action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

That the defendant have and recover of and from the plaintiff the costs and disbursements herein taxed at $10.00.

That the injunction heretofore issued in this cause be and the same is hereby dissolved.

Plaintiff at this time, by its attorney, Franklin T. Griffith, gives notice in open court that the plaintiff appeals from the above decree and from the whole thereof to the Supreme Court of the State of Oregon, which said appeal is hereby allowed.

63 Dated this 22d day of June, A. D. 1908.

WM. GALLOWAY,
Judge of the Third Judicial District.
of the State of Oregon.

And afterward, on the said 22d day of June, 1908, the following

Order of Court Staying Proceedings

was duly made and entered of record, viz:

(Title.)

This matter coming on to be heard this 22 day of June, 1908, plaintiff appearing by Frederick V. Holman and Franklin T. Griffith, its attorneys, and the defendant appearing by A. M. Crawford, Attorney General, Giltner & Sewall and C. B. Aitchison, its attorneys, and the court having heretofore, on this day rendered its certain decree in the above entitled suit dismissing the complaint of plaintiff and sustaining the amended order of the defendant complained of in said suit and plaintiff having, by its said attorneys, at the time said decree was made given notice in open court that plaintiff appeals from such decree and the whole thereof, to the Supreme Court of the State of Oregon, and which notice of appeal has been duly entered in the Journal of this court and plaintiff having applied for an order of this court directing that the operation of the amended order of said defendant complained of in the above entitled suit, be suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon, and it appearing to the court that said application of plaintiff should be granted, now, therefore, it is Ordered,

That the operation of the order of the said defendant dated the 30th day of January, 1908, as amended by said defendant on the 11th day of April, 1908, wherein said defendant ordered and required the said plaintiff to desist in certain practices and to put into effect certain rates in said amended order specified, which are as follows:

64 "It is therefore Ordered, Considered and Determined, that the Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, the

rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Street in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

"It is further Ordered, Considered and Determined that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service."

Be stayed and suspended until the final determination of this cause in the Supreme Court of the State of Oregon upon condition that the said plaintiff shall, within ten days from the date hereof,
65 make and execute a bond herein in the sum of Five Thousand ($5,000.00) Dollars as by law required, in favor of said Railroad Commission of Oregon for the benefit of whom it may concern in accordance with the statute in such cases made and provided, to be approved by this court. And it is further ordered,

That from and after the filing and approval of said bond as aforesaid, the operation of said order of said defendant as amended be, and the same is hereby, suspended and stayed until the final determination of said cause in the Supreme Court of the State of Oregon. And it is further Ordered,

That pending said appeal said plaintiff shall continue to issue to each person traveling as a passenger upon its said Oregon City Division between the stations of Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction and paying a cash fare therefor fifteen cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare is paid by such person or passenger subject to repayment to such person or passenger by said plaintiff, should the decree of this court in said cause be affirmed upon said appeal.

Dated June 22, 1908.

WM. GALLOWAY, *Judge.*

66 And afterward, on the said 22d day of June, 1908, the said plaintiff duly filed with the clerk of the said court, its

Undertaking on Appeal

in words and figures as follows:

(Title.)

Whereas the plaintiff in the above entitled suit has appealed to the Supreme Court of the State of Oregon from a judgment order and decree made and entered against the plaintiff in said suit, in the said Circuit Court, in favor of the defendant in said suit, on the 22d day of June, 1908, for the sum of $10.00, costs and disbursements of suit, dismissing the complaint of plaintiff and sustaining that certain order of the defendant made and rendered on the 30th day of January, 1908, as amended by the defendant on the 11th day of April, 1908, wherein said defendant ordered and directed said plaintiff as follows:

"It is therefore Ordered, Considered and Determined, that the said Portland Railway Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

"It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the City of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the City of Portland, Oregon, in either direction.

67 "It is further Ordered, Considered and Determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this Commission as may be necessary to make the same conform to this order, and that the said rates and regulations as to transfers shall of themselves take effect and become operative thirty days after such service."

Now, Therefore, We, Portland Railway Light and Power Company, as principal, and American Surety Company of New York as surety, in consideration of the premises and of such appeal and of the suspending and staying of the operation of the said order of the said defendant dated January 30, 1908, as amended April 11, 1908, do hereby jointly and severally undertake and promise, on the part of the appellant, that if said decree appealed from, or any part thereof, be affirmed, the appellant shall pay and satisfy the amount directed to be paid thereby and all damages, costs and disbursements which may be awarded against the appellant on the appeal.

And said Portland Railway Light and Power Company as principal and American Surety Company of New York as surety, in consideration of the suspending and staying of the operation of said order of said defendant as amended, pending the said appeal, do
68 jointly and severally undertake and promise the Railroad Commission of Oregon, for the benefit of whom it may concern, to the effect that in case said decree shall be affirmed, the said appellant shall answer for all damages caused by the delay in the enforcement of the said order of the said defendant as amended, as aforesaid, and all penalties that would attach against the said Portland Railway Light and Power Company and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said defendant as amended, as aforesaid, had not been stayed and suspended during the period transpiring from the time of taking said appeal until the final determination of said suit in the said Supreme Court, not exceeding the sum of Five Thousand ($5,000.00) Dollars, as it or they may sustain by reason of said appeal.

Dated this 22 day of June, 1908.

PORTLAND RAILWAY LIGHT AND POWER, COMPANY,
By FRANKLIN T. GRIFFITH, *Its Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By HOMER H. SMITH, *Resident Vice President.*

Attest:
CAREY F. MARTIN,
Resident Asst. Secretary. [SEAL.]

STATE OF OREGON,
County of Marion, ss:

Due service of the within undertaking is hereby accepted in Marion County, Oregon, this 22 day of June, 1908, by receiving a copy thereof, duly certified to as such by Franklin T. Griffith, of attorneys for plaintiff.

A. M. CRAWFORD,
Of Attorneys for Def't.

Endorsed: "Approved June 22, 1908. Wm. Galloway, Judge."

69 In the Circuit Court of the State of Oregon for the County of Marion.

STATE OF OREGON,
County of Marion, ss:

I. R. D. Allen, Clerk of the Circuit Court of the State of Oregon, for the County of Marion, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries, constituting the judgment roll, together with notice of appeal (embodied in the final order) and undertaking on appeal and proof of service thereof, in the case of

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff and Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Defendant and Respondent,

have by me been compared with the originals thereof, and that they are true and correct copies of such original pleadings, papers, orders and journal entries and of said Notice of Appeal (embodied in said final order) and of said Undertaking on Appeal and proof of service thereof, and as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 12th day of August, A. D. 1908.

R. D. ALLEN,
Clerk of the Circuit Court in and for the County of Marion, State of Oregon.

70 In the Circuit Court of the State of Oregon for the County of Marion.

No. 8963, Oak Grove Case.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff,
vs.
RAILROAD COMMISSION OF OREGON, Defendant.

This matter coming on to be heard, plaintiff appearing by Franklin T. Griffith, Esq., of counsel, and it appearing to the Court that heretofore on the 22d day of June, 1908, upon motion of plaintiff, an order was duly made in this court allowing plaintiff until the 22d day of August, 1908, in which to file its transcript on appeal herein in the Supreme Court of the State of Oregon, and it further appearing to the court that the clerk of this court has failed to enter the said order upon the Journal of this court, now upon motion of plaintiff,

It is ordered that plaintiff be allowed until the 22d day of August,

1908, in which to file its transcript on appeal in this cause in the Supreme Court of the State of Oregon, And it is further

Ordered that this order be entered nunc pro tunc as of the 22d day of June, 1908.

Dated August 17, 1908.

WM. GALLOWAY, *Judge.*

71 STATE OF OREGON,
County of Marion, ss:

I, R. D. Allen, County Clerk for Marion County, State of Oregon, and ex-officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing Exhibits and testimony constitute all the evidence heard or offered to be heard at the trial of a cause in the Circuit Court of the State of Oregon for Marion County, wherein the Portland Railway Light and Power Company was plaintiff and the Railroad Commission of Oregon was defendant.

Witness my hand and the seal of said Court this 12th day of August, A. D., 1908.

R. D. ALLEN, *Clerk.*

72 Endorsed: "Oak Grove Case." No. 8963. In the Circuit Court of the State of Oregon for the County of Marion. Department No. 2. Portland Railway Light & Power Company, Plaintiff, vs. Railroad Commission of Oregon, Defendant Transcript on appeal. Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

73 P. R. L. & P. Co. EXHIBIT 1.

In the Circuit Court of the State of Oregon for the County of Marion.

6967
Case No. 6968, Drawer No. 652.

Filed Aug. 22, 1908. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Proceedings.

Filed March 12th, 1908. R. D. Allen, Clerk, by Bertha L. Allen, Deputy.

P. R. Lt. & P. Co. Ex. 1.

74 Before the Railroad Commission of Oregon.

Present: Thos. K. Campbell, Chairman, Oswald West, and Clyde B. Aitchison, Commissioners; Geo. O. Goodall, Secretary.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Be it remembered: That the following proceedings were had before the Railroad Commission of Oregon in the above entitled matter, to-wit:

On, to-wit, the 15th day of August, 1907, the plaintiff, the Oak Grove Improvement Association, files its complaint herein in words and figures following, to-wit:

74½ Before the Railroad Commission of Oregon.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

(Copy.)

Now comes the above named plaintiff by B. Lee Paget, its president, as relator, and respectfully shows:

1.

That the plaintiff is a voluntary association of persons residing in and about stations on the line of the defendant known as Milwaukee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof, and the object of said association is the general improvement, advancement and welfare of the community and of property interests in and about the said localities. That its secretary is S. L. Castro, whose address is Oak Grove, Oregon.

2.

That the defendant is a corporation organized and existing under the laws of Oregon, and its articles of incorporation heretofore duly executed and filed as by law required do set forth and provide therein as follows:

In addition to the enterprise business * * * the new enterprise or pursuit in which this corporation purposes to engage is the construction, purchase, acquiring, ownership, improvement, leasing from or to other corporations or individuals, maintenance, use and

operation of lines of street railway and other lines, with rolling stock and equipment, car barns, shops, power plants, depots, stations, poles, wires, conduits, subways, apparatus and appliances, telephone lines, telegraph lines and other buildings and property for the operation thereof in, on, over, under, along and through the streets, roads, alleys and other public places and private places and private property in the cities of Portland, Oregon City and Salem, in the counties of Multnomah, Clackamas and Marion, in the state of Oregon,
75 and in and through other counties, cities, towns and villages of said state of Oregon and in the city of Vancouver and in the county of Clarke in the State of Washington and in and through other cities, towns and villages in the said State of Washington * * *

In the prosecution of and in connection with and in addition to the aforesaid general enterprise or pursuit, this corporation purposes to engage in the following enterprise, or pursuit:

To construct, purchase, acquire, own, improve, lease from and to other corporations and individuals, maintain, use and operate lines of railway in and through the cities of Portland, Oregon City and Salem and the counties of Multnomah, Clackamas and Marion and other counties in the state of Oregon and also in the city of Vancouver and the county of Clarke and other counties in the state of Washington and for this purpose to exercise the right of eminent domain and appropriate private property.

To receive, carry and transport passengers, freight, baggage, express matter and United States Mails.

To charge and collect rates, fares, freights, tolls, lockage, and other compensation for any service, right, privilege, benefit, use, accommodation, passage, transportation, commodity or other matter or thing rendered or furnished by it.

This corporation proposes to acquire, make, construct and operate lines of railway with termini as follows:

(*a*) From the city of Portland in the county of Multnomah, state of Oregon, in a general southeasterly direction to sec. 3 T. 4 S. R. 4 E. of W. M. in the county of Clackamas in said state.

(*b*) From the said city of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Willamette River about 1 mile south of Oregon City in said County of Claskamas.

(*c*) From the said city of Portland in a general easterly and southeasterly direction to and through the village of Lents, to Lents Junction on the line of Railway first above mentioned, in said
76 county of Multnomah.

(*d*) From a point on the line of railway first above mentioned near the town of Cedarville in sec. 17 T. 1 S. R. 3 E. of W. M. in a general northerly and northeasterly direction to and through the village of Troutdale in said county of Multnomah to the Columbia River opposite Lady's Island.

(*e*) From said city of Portland in a general northerly direction to Shaw's or Hayden's Island in the Columbia River in said county of Multnomah.

(*f*) From said City of Portland, in a general westerly or north-

westerly direction to the city of St. Johns in said county of Multnomah.

(*g*) From the town of Oswego in said county of Clackamas in a general southerly direction to the town of Willamette in said county, thence in a general northwesterly direction to the town of Tualitin in the county of Washington in said state.

(*h*) From the city of Salem in the County of Marion in said state in a general southerly direction, a distance of about three miles to a quarry known as the Ewald property.

3.

That the defendant has been for a long time past and is now engaged in the enterprise and business set forth in its said articles and particularly in the transportation of passengers as a common carrier over the lines of its railway system, all radiating from divers and sundry places within the city of Portland, outward therefrom.

4.

That the defendant as such common carrier has for a long time past and does now own and operate or operate, manage and control an interurban railroad between various cities, towns, villages, stations and places and for example more particularly the following, viz:

Between

(*a*) The termini of its lines of railway on Portland Heights, Willamette Heights, Thurman Street, Terminal Yards, Mt.
77 Tabor, Albina Avenue, Montaville, Irvington, Russell Street, Fulton, Hamilton Avenue, Jefferson Street, Lincoln Street, Montgomery Street, Northrup Street, as also other streets and places, all within the said city of Portland,

And

(*b*) St. Johns, Oregon City, Estacada, Milwaukee, Gresham, each municipalities organized and existing under the constitution and laws of Oregon, as well as other places and stations beyond the limits of the city of Portland, being for example Lents, Lents Junction, Courtney, Oak Grove, Center, Risley, Milwaukee Heights, Golf Links, Sellwood, Gates and many others.

5.

That the defendant demands and collects rates, fares and charges for the transportation of members of the plaintiff association and all other persons travelling as passengers upon its said lines between the places named in subdivision (*a*) paragraph 4 herein and the places named below; amounts for the services so rendered by it to such persons, as set opposite each place, the distance travelled being likewise set opposite, to-wit:

Golf Junction	upward of	5.36	miles	5	cents.
Lambert	" "	5.93	"	15	cents.
Knight	" "	6.29	"	15	"
Hendee	" "	6.44	"	15	"
Milwaukee	" "	6.71	"	15	"
Milwaukee Heights	" "	7.70	"	20	"
Courtney	" "	8.30	"	20	"
Oak Grove	" "	8.48	"	20	"
Center	" "	8.68	"	20	"
Reservoir	" "	4.69	"	5	"
Lents	" "	7.69	"	5	"
Lents Junction	" "	10.71	"	15	"
Gilbert	" "	11.65	"	15	"
Gates	" "	12.38	"	15	"
78 Wilson	upwards of	13.00	miles	20	cents.
Sycamore	" "	13.48	"	20	"
Jenne	" "	14.43	"	20	"
St. Johns	" "	9.37	"	5	"

and also between its station of Golf Junction and places named below, fares for distances as set opposite thereto, viz:

Nickum	1.15	miles	5	cents.
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Jenne	9.07	"	10	"
Hendee	1.08	"	5	"
Milwaukee	1.35	"	5	"
Island	1.69	"	5	"
Milwaukee Heights	2.35	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"

6.

That the rates, fares and charges for the services rendered by defendant in transporting passengers between the places set forth in sub-division (*a*) of paragraph 4 herein and the stations of Milwaukee Heights, Courtney, Oak Grove, and Center should be no greater than 5 cents for one trip over defendant's said railway lines and the aforesaid rates and fares heretofore and now demanded and collected of each and all passengers by the defendant for transportation between the places last named are much higher than for identical services rendered by the defendant to other persons travelling over its said lines between other interurban places, for the same or for greater distances, as clearly appears by an inspection of defendant's official schedules of such rates and charges herein set out, and all of said acts, demands,
charges by and on the part of the defendant tend to prevent
79 the settlement, building up and increase in valuations of property in the community where members of the plaintiff reside,

to their great disadvantage, damage and injury, and against their general welfare; whereas the acts, charges and things as herein related with respect to other localities and persons receiving like service at less rates and fares tend to a directly opposite result as with the plaintiff and its localities. That the said rates and fares so charged and collected of members of the plaintiff and all persons travelling between Milwaukee Heights, Courtney, Oak Grove, Center, and the other points hereinbefore set out are, *but* reason of the foregoing premises unjust, unreasonable and contrary to the statutes made and provided.

7.

Wherefore, plaintiff prays that the defendant be required to answer the charges herein and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of chapter 53, Laws of Oregon for the year 1907; and that the commission shall fix and order substituted such rate or rates, fares or charges as it shall determine to be just and reasonable, and which shall be charged and collected and complied with in the future, in the place of those found to be unreasonable or unjustly discriminatory; and for such other and further relief or orders as may be meet and necessary in the said matter.

Dated at Portland, Oregon, this 14th day of August, 1907.

(Signed) THE OAK GROVE IMPROVEMENT ASSOCIATION, *Plaintiff*,
(Signed) By B. LEE PAGET, *President*.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Aug. 15, 1907. E. G. Miller, Acting Secretary.

80 On August 15th, 1907, the Railroad Commission of Oregon caused to be issued a notice that complaint has been made to the defendant, Portland Railway Light and Power Company, which complaint is in the words and figures following, and service of which is duly accepted by said defendant on August 16th, 1907, as appears by acceptance of service upon said notice.

81 (Copy.)

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,
vs.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, Defendant.

Notice to Defendant That Complaint Has Been Made.

To the above named Defendant:

Please take notice that the above named plaintiff has made complaint to the Railroad Commission of Oregon, a certified copy of which complaint is herewith served upon you, and is made a part hereof. If you desire to make any answer to said complaint, the same should be filed within ten days from the date of service hereof.

After the expiration of ten days from the date of service hereof, said Commission will proceed to investigate the matters and things set forth in the said complaint.

Dated this 15th day of August, 1907.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOS. K. CAMPBELL,
OSWALD WEST,
CLYDE B. AITCHISON,
Commissioners.

[Seal of Railroad Commission of Oregon.]

Attest:

E. G. MILLER,
Acting Secretary.

Due and legal service of the foregoing notice is hereby accepted, and a certified copy of said complaint received this 16th day of August, 1907.

(Signed) PORTLAND RAILWAY, L'T & POWER CO., *Defendant,*
By F. I. FULLER,
(Title) *Vice Pres.*

82 And afterwards, on, to-wit, the 22d day of August, 1907, the said notice that complaint has been made, together with the defendant's acceptance of service thereof, were returned to the said Commission and were fuly filed.

And on, to-wit, September 5th, 1907, the defendant filed its answer herein in words and figures following, to-wit:

83

(Copy.)

Before the Railroad Commission of Oregon.

File No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. Lee Paget, as Relator, Plaintiff,

vs.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

I.

Comes now the defendant and for answer to the complaint on file herein admits, denies and alleges as follows:

1.

Admits all of paragraph 1 of said complaint.

2.

Admits all of paragraph 2 of said complaint.

3.

Denies all of paragraph 3 of said complaint except that defendant admits that it has been and is now engaged in the enterprise and business of the transportation of passengers as a common carrier over lines of railway with termini as follows:

(*a*) From the city of Portland in the County of Multnomah, state of Oregon, in a general southeasterly direction to sec. 3 T. 4 S. R. 4 E. of W. M. in the county of Clackamas in said state—this line being known and hereinafter referred to as the "Springwater Division."

(*b*) From the said city of Portland in a general southerly direction to and through Oregon City to the town of Canemah on the Willamette River about 1 mile south of Oregon City in said county of Clackamas—this line being known and hereinafter referred to as the "Oregon City Division."

(*c*) From the said city of Portland in a general easterly and southeasterly direction to and through the village of Lents, to Lents Junction on the line of railway first above mentioned, in said county of Multnomah—this line being known and hereinafter referred to as the "Mt. Scott Division."

84 (*d*) From a point on the line of railway first above mentioned near the town of Cedarville in sec. 17 T. 1 S. R. 3 E. of W. M. in a general northerly and northeasterly direction to and through the village of Troutdale in said county of Multnomah to the Columbia River opposite Lady's Island—this line being known and hereinafter referred to as the "Troutdale Division."

4.

Denies all of paragraph 4 of said complaint, except that defendant admits that it has and does own and operate and manage and control interurban railroads between the termini of its lines of railway in the city of Portland and Oregon City, Milwaukee, Gresham, Lents, Lents Junction, Courtney, Oak Grove, Center, Risley, Milwaukee Heights, Golf Junction, Sellwood and Gates, and between various cities, towns, villages, stations and places on its said "Springwater division" and on its said "Oregon City division" and on its said "Mt. Scott division" and on its said "Troutdale division": and defendant denies in particular that any of the termini of its lines of railway in the city of Portland are at any of the places or points in said city set forth in subdivision (*a*) of said paragraph 4, or that it owns or operates or manages or controls any line of railroad to St. Johns or between St. Johns or any other place.

5.

Denies all of paragraph 5 of said complaint except that defendant admits that it demands and collects for the transportation of persons travelling as passengers upon its said lines of railway between its terminus at First and Alder Streets in said city of Portland and the places and points named below and between Golf Junction and the places and points named below, the following rates, fares and charges—the distances being as set forth below, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within city of Portland)....	5.36 miles	5 cents.

Lambert	5.93 miles	10 cents.
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukee	6.71 "	10 "
Island	7.05 "	10 "
Milwaukee Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "

On Mt. Scott Division.

Reservoir (within City of Portland).....	4.69 miles	5 cents.
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within city of Portland)....	5.35	miles	5 cents.
Nickum	6.51	"	5 "
Kerrigan	7.26	"	10 "
Bell	8.51	"	10 "
Kendall	9.32	"	10 "
Lents Junction	10.71	"	10 "
Gilbert	11.65	"	10 "
Gates	12.38	"	10 "
Wilson	13.00	"	15 "
Sycamore	13.48	"	15 "
Jenne	14.43	"	15 "

Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5 cents.
Knight	.93	"	5 "
Hendee	1.08	"	5 "
Milwaukee	1.35	"	5 "
Island	1.69	"	5 "

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Milwaukee Heights	2.34	"	10 "
Courtney	2.94	"	10 "
Oak Grove	3.12	"	10 "
Center	3.32	"	10 "
Risley	3.90	"	10 "

On Springwater Division.

Nickum	1.15	miles	5 cents.
Kerrigan	1.90	"	5 "
Bell	3.15	"	5 "
Kendall	3.96	"	5 "
Lents Junction	5.35	"	5 "
Gilbert	6.29	"	10 "
Gates	7.02	"	10 "
Wilson	7.64	"	10 "
Sycamore	8.12	"	10 "
Jenne	9.07	"	10 "

6.

Denies all of paragraph 6 of said complaint.

7.

Denies each and every allegation of said complaint except as herein specifically admitted.

II.

And for a further and separate defense to plaintiff's complaint this defendant says that said complaint does not state facts sufficient to show that defendant has in any respect violated any of the provisions of chapter 53 of the session laws of 1907 of the Legislative Assembly of the state of Oregon and that this Railroad Commission has no power or authority or jurisdiction to proceed further against this defendant under plaintiff's complaint.

III.

And for a further and separate defense to plaintiff's complaint this defendant alleges:

87

1.

That defendant's "Oregon City division" extends from its terminus on First and Alder Streets in Portland to and through Golf Junction on the southern boundary line of Portland and thence in a general southerly direction to Oregon City and Canemah; and that defendant's "Springwater division" extends from said terminus in Portland to and through said Golf Junction and thence in a general easterly direction to and through Lents Junction and in a general southeasterly direction to Cazadero; and that defendant's "Mt. Scott division" extends from said terminus in Portland in a general easterly and southeasterly direction, not passing through or near said Golf Junction, to and through Lents and thence in the same direction to said Lents Junction.

2.

That defendant operates its cars of and from all its said divisions within the corporate limits of the city of Portland under franchises by the terms and provisions of which it is prohibited from charging any passenger more than five cents for any one continuous ride in any one general direction on any of said cars; and that as said city of Portland has a population exceeding 50,000 inhabitants, this defendant is also prohibited by section 2096 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon from charging any passenger more than five cents for a continuous ride in one general direction in said city.

3.

That defendant charges a fare of 25 cents for a ride from its said terminus in Portland to Oregon City, a distance of 14.47 miles; and that said fare is approximately at the rate of 2 cents per mile.

4.

That because of the facts set forth in paragraph 2 of this defense, defendant cannot, on or for any ride on its "Oregon City division" charge at the rate of 2 cents per mile or charge more than 5 cents in all for the 5.36 miles between its said terminus on First and

Alder Streets and Golf Junction, as all of said 5.36 miles *is*
88 within said city of Portland; and that, because it is not practical or convenient to collect fares on said division other than in multiples of five cents, defendant has, for the purpose of maintaining fair and just rates throughout said division, distributed the remaining 20 cents of the 25 cent fare from Portland to Oregon City by dividing the remaining 9.11 miles of the total mileage between said cities into four districts and applying to all points within each district a group rate of 5 cents more than the fare to points within the next district on the north. Thus: (*a*) The first district includes Lambert, Knight, Hendee, Milwaukee and Island and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 10 cents and from Golf Junction 5 cents less; (*b*) the second district includes Milwaukee Heights, Courtney, Oak Grove, Center and Risley and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction 5 cents less; (*c*) the third district includes all stations from and including Concord to and including Clackamas Bridge and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction 5 cents less; and (*d*) the fourth district includes Park Place and Oregon City and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 25 cents and from Golf Junction 5 cents less.

5.

That if, as asked by the plaintiff, the fares from Portland to Milwaukee Heights and to Courtney and to Oak Grove and to Center and to Risley—being the places within the second district referred to in the preceding paragraph—should be reduced to 5 cents, then, and with far more reason than plaintiff has for its complaint, complaints of unjust and unreasonable fares to and unjust discrimination against stations and places on said "Oregon City division" south of Risley would be made to this Commission,
89 and, to be consistent, this commission would have to reduce the fares from Portland to the districts referred to in the preceding paragraph, as follows: to all places within the third district to 10 cents and to all places within the fourth district to 15 cents; and that such reductions would mean a 15 cent fare or a rate of one cent per mile from Portland to Oregon City; and that, furthermore, if plaintiff is entitled to have the fares reduced from Portland to places within the said second district because the fares to other points and places on other lines and divisions of defendant's railway system are less per mile, then, after plaintiff has accomplished its purpose, complaints will pour in to this commission from all places on any of defendant's lines and divisions to which the fare charged for and rate from Portland is less per mile than the reduced fares granted on plaintiff's complaint to said places within the said second district of the "Oregon City division," and eventually the fares on all of the defendant's lines and divisions

would have to be reduced to the rate of one cent per mile, which would be absolutely disastrous to the defendant's business and effectively stop any extension of its lines or expansion of its system of interurban electric railway.

6.

That though the fare charged by defendant for one ride from Portland to the places included in said second district on said "Oregon City division" is 15 cents, defendant has established commutation rates to said places and sells commutation books to each of said places, containing 20 coupons, each of which entitles the bearer to a ride to or from Portland, at the following rates: $1.50 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center, and $2.00 for Risley.

7.

That Golf Junction on the southern boundary of Portland is the junction of defendant's "Oregon City division" and "Springwater division," and from that point to its terminus on First and Alder Streets in Portland, defendant's cars of and from both divisions are run over the same tracks; and that defendant's "Oregon
90 City division" extends south from Golf Junction, and on trips to or in the direction of Oregon City its cars thereon are out of Portland after leaving Golf Junction; and that defendant's "Springwater division" proceeds in an easterly direction from Golf Junction, and on a trip to or in the direction of Cazadero its cars on said division remain within the corporate limits of Portland for nearly a mile after leaving Golf Junction; and that the station of Nickum referred to in plaintiff's complaint is the first station on said "Springwater division" east of Golf Junction and is only about one half mile east of the easterly boundary of Portland; and that on said "Springwater division" defendant runs regular trains which stop for the taking on and letting off of passengers only at stations, and that as there is no station on said division between Golf Junction and Nickum and the former is within Portland and the latter but a short distance out of Portland and passengers are entitled to and can insist upon being carried to the boundary of Portland for 5 cents and it would be decidedly inconvenient and unnecessarily expensive and to the detriment of the service for defendant to stop all its trains at said boundary, defendant has extended the 5 cent fare limit on said division to Nickum as the first station outside of Portland.

8.

That the circumstances and conditions at and about and the service to Nickum are not like or similar to or contemporaneous with the circumstances and conditions at and about the service to the places included in said second district of said "Oregon City division;" and that the fare charged by defendant from Portland to Nickum on said "Springwater division" does not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by defendant from Portland to the places within said

second district for the purpose of determining whether or not the latter are just or reasonable or justly or unjustly discriminatory.

9.

That defendant's "Mt. Scott division" consists of a line of
91 railway running from its said terminus on First and Alder Streets in Portland to Mt. Tabor Junction at about the intersection of Hawthorne Avenue and East Forty-eight Street in Portland, and then in a general southeasterly direction to Lents in Multnomah County, and then a distance of .62 of a mile to a junction with said "Springwater division" at a point known as Lents Junction; and that though it is 10.71 miles from Portland to Lents Junction by the "Springwater division," it is only 8.31 miles from Portland to Lents Junction by the "Mt. Scott division;" and that said "Mt. Scott division" to a point about one mile southeasterly from Mt. Tabor Junction and about three miles northwesterly from Lents is wholly within the corporate limits of Portland.

10.

That the right of way and track and road from Mt. Tabor Junction to Lents were first acquired and constructed and the railway between said points was first operated by the Portland, Chicago & Mt. Scott Railway Company, a corporation whose stock was principally owned by those who lived or owned property at and between said points; and that defendant's predecessor acquired said stock and said right of way and track and road and railway between Mt. Tabor Junction and Lents from said stockholders and owners under an arrangement and agreement by which, for a valuable consideration, it expressly agreed that no more than a five cent fare should be charged by defendant's said predecessor and its successors and assigns for any ride between Lents and Portland; and that defendant is bound by said arrangement and agreement, and by reason thereof cannot charge more than 5 cents for any ride on said "Mt. Scott division" between Lents and Portland.

11.

That said "Mt. Scott division" was extended from Lents to Lents Junction, a distance of .62 of a mile, for the benefit and accommodation of the public generally, and particularly that portion thereof residing or being on or near the "Mt. Scott division" who would desire to go to points on the "Springwater Division," and
92 that portion thereof residing or being on or near the "Springwater division" who would desire to go to points on the "Mt. Scott division" and that the 5 cent fare limit on or via the "Mt. Scott division" was and is stopped at Lents; and that defendant could not and cannot charge more than 5 cents for a ride over or via said "Mt. Scott division" from Lents to Lents Junction or to points within a reasonable distance beyond said Lents Junction on the "Springwater division."

12.

That because of the facts and conditions set forth in the three preceding paragraphs hereof and the situation and conditions of defendant's lines and traffic generally, defendant cannot charge for a ride from Portland to Lents Junction over the "Springwater division" more than 10 cents—that being the fare it must charge for a ride between said points on the "Mt. Scott division;" and that it necessarily follows that defendant cannot charge more than ten cents for a ride on the "Springwater division" from Portland to any point between Portland and Lents Junction, for which reasons the fare from Portland to all points between Nickum and Lents Junction is only ten cents.

13.

That there is considerable travel between points beyond Lents Junction on the "Springwater division" and Lents and points between Lents and Portland on the "Mt. Scott division," such travel transferring from one to the other division at Lents Junction; and that, if more than a five cent fare was charged between Lents and any and all points on the "Springwater division" beyond Lents Junction regardless of their distances beyond Lents Junction, it would result in a division of only .62 of a mile from Lents to Lents Junction for and on which a five cent fare was charged and in unreasonable and unlawful rates from some points beyond Lents Junction to Lents; and that it therefore became necessary to create a district extending from Lents on the "Mt. Scott division" to Gates on the "Springwater division," a distance of 2.29 miles and to establish and apply a group rate of 10 cents for the fare from Portland via Lents to each station in that district on the "Spring-
93 water division," to-wit: Lents Junction, Gilbert and Gates,—Gates being only 1.67 miles beyond Lents Junction; and that, as it became necessary to establish a 10 cents rate from Portland to Gilbert and to Gates via Lents and the "Mt. Scott division," defendant had to also fix its fare from Portland to Gilbert and to Gates over the "Springwater division" at 10 cents.

14.

That the total distance from Portland to Cazadero over the "Springwater division" is 37.51 miles and the fare charged by defendant for the ride from Portland to Cazadero is 80 cents or approximately 2 cents per mile; and that because of the facts set forth in the preceding five paragraphs of this answer defendant cannot and does not charge more than 10 cents for that portion of said ride from Portland to Cazadero which ends at Gates; and that the distance from Gates to Cazadero is 25.23 miles and the remaining 70 cents of the total fare from Portland to Cazadero should be equitably distributed over said 25.23 miles; and that, because it is not practical or convenient to collect fares on the "Springwater

division" other than in multiples of five cents, defendant has, for the purpose of maintaining fair and just rates throughout said division, distributed said remaining 70 cents of said 80 cent fare from Portland to Cazadero by dividing said remaining 25.23 miles of the total mileage between said points—being the distance from Gates to Cazadero—into fourteen districts and applied to all points with- each district a group of rates of 5 cents more than the fare to points within the next district nearer Portland; and that, as a matter of fact, these group rate districts on the "Springwater division" are approximately only 1.81 miles in length, while the group rate districts on the "Oregon City division" are approximately 2.27 miles in length—showing that, as a whole, lesser fares are charged to intermediate points on the "Oregon City division" than on the "Springwater division"—the difference in this regard being due to the differences in the situation and circumstances and conditions of the two divisions as hereinbefore shown and explained; and
94 that the first of said districts on said "Springwater division" beyond Gates includes the stations of Wilson, Sycamore and Jenne and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 15 cents and from Golf Junction 5 cents less; and that the second of said districts on said "Springwater division" beyond Gates includes the stations of Meadowbrook and Cedarville and the group rate applied to said district and the fare for and rate to each station in said district from Portland is 20 cents and from Golf Junction 5 cents less; and that in like manner the group rate applied to each of said districts and the fare for and rate to each station in said districts from Portland and from Golf Junction increases 5 cents as each district is reached on the way to Cazadero.

15.

That the situation of and the circumstances and conditions governing and controlling the traffic and service upon defendant's said "Springwater division" and said "Mt. Scott division" are not like or similar to or contemporaneous with the situation of and the circumstances and conditions governing and controlling the traffic and service upon defendant's "Oregon City division"; and that the fares charged by defendant on its said "Springwater division" and on its said "Mt. Scott division" do not and cannot serve as any fair or reasonable or intelligent basis of comparison with the fares charged by defendant on its "Oregon City division" for the purpose of determining whether or not any of the latter are just or reasonable or justly or unjustly discriminatory.

16.

That the fares charged by defendant on all of its said divisions are fair and reasonable and just and in and by none of them is any provision of chapter 53 of the Session Laws of Oregon for 1907 violated.

Wherefore, defendant prays that this complaint be dismissed, and that the defendant go hence without any action or order being taken or made herein by this Honorable Commission.

PORTLAND RAILWAY LIGHT & POWER COMPANY,

95 By F. I. FULLER, *Vice Pres't.*
DAN J. MALARKEY AND
E. B. SEABROOK,
Attorneys for Defendant.

Endorsed on back as follows: Railroad Commission of Oregon. Filed Sept. 5, 1907. Geo. O. Goodall, Secretary.

96 Endorsements appearing on inside of cover of answer to complaint: to-wit:

STATE OF OREGON,
County of Multnomah, ss:

I, F. I. Fuller, being first duly sworn, depose and say that I am the Vice President and Manager of the defendant corporation in the above entitled case; and that the foregoing answer is true as I verily believe.

(Signed) F. I. FULLER.

Subscribed and sworn to before me this 4th day of September, 1907.

(Signed) DAN J. MALARKEY,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due and legal service of the within paper in Multnomah County, Oregon, this 4th day of September, 1907, is hereby admitted.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

97 And on, to-wit, September 9th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

Ordered: That on the 24th day of September, 1907, at 10 o'clock in the forenoon of the said day, at the Newmarket Building in Portland, Oregon, the Railroad Commission of Oregon will proceed to investigate the above named cases, Nos. 89, 93 and 94 and will consider and determine such matters and make such order or orders as may be proper in the premises.

And on September 12th, 1907, the said commission caused ten days' notice of the time and place and when and where such matters would be considered and determined to be given to the defendant railroad and the plaintiff in words and figures following, due and legal service of which was accepted by both plaintiff and defendant as appears by the acceptance of service annexed to the said notice, to-wit:

98 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Notice of Hearing.

Notice of Time and Place of Hearing.

To the above named Plaintiff and Defendant:

Whereas, the above named plaintiff has heretofore filed with the Railroad Commission of Oregon a complaint, among other things alleging,

That the rates charged by the above named defendant for transportation over its lines to Milwaukee Heights, Courtney, Oak Grove and Center are unreasonable and discriminatory as compared to rates and fares charged for service to other localities and result to the great disadvantage, damage and injury of the residents of said named places.

And praying that said Railroad Commission of Oregon shall, after due hearing and investigation, make order commanding defendant to cease and desist from violations of chapter 53 Laws of Oregon for the year 1907 and that said commission shall fix and order substituted such rate or rates as it shall determine to be just and reasonable.

And whereas, the undersigned commission did on the sixteenth day of August, 1907, serve on the said defendant a copy of said complaint, together with a notice that the same had been filed, and that after the expiration of ten days from the date of service thereof said commission would proceed to investigate the matters and things set forth in said complaint;

And Whereas, more than ten days have elapsed since said complaint and the accompanying notice were served on said defendant, and said defendant has answered thereto;

Now, therefore, notice is hereby given that on the 24th day of September, 1907, at the hour of ten o'clock in the forenoon of the said day, or as soon thereafter as the parties can be heard, at the Newmarket Building, Portland, Oregon, the undersigned Railroad Commission of Oregon will proceed to investigate the said complaint and consider and determine such matters and make such order or orders as may be proper in the premises, at which time and place you will be entitled to be present, to be heard, and to have
99 process to enforce the attendance of witnesses.

Dated at Salem, Oregon, this 12th day of September, 1907.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
C. B. AITCHISON,
OSWALD WEST.

Attest:
GEO. O. GOODALL,
Secretary.

100 Due and legal service of the above and foregoing notice is hereby accepted and a copy thereof received this 13th day of September, 1907.

(Signed) PORTLAND RAILWAY LIGHT AND POWER COMPANY,
By F. I. FULLER, *Vice-Pres.*

Endorsed on the back as follows: Railroad Commission of Oregon. Filed Sep. 14, 1907. Geo. O. Goodall, Secretary.

101 And on September 19th, 1907, the following order was entered by the said commission in the above entitled matter, to-wit:

"Now on this 19th day of September, 1907, defendant in the above entitled case files a motion for continuance, and said motion is resisted by plaintiff; and same having been considered by the commission, it is Ordered, that the motion for continuance be and the same is hereby sustained, and the above entitled case be continued and be set for hearing on Monday, the 28th day of October, 1907, at ten o'clock in the forenoon of said day, at the Newmarket Building in Portland, Oregon."

And on, to-wit, October 28th, 1907, this matter comes on to be heard before the Railroad Commission of Oregon, pursuant to the order of said commission of September 19th, 1907. The plaintiff appears by B. Lee Paget, Esq., its Relator, and R. C. Wright, its Attorney. Defendant appears by F. I. Fuller, Esq., its Vice President, and D. J. Malarkey, Esq., and E. B. Seabrook, Esq., its Attorneys.

The evidence of the various witnesses was offered and received pro and con and adjournment taken at 5 P. M. until 9 A. M. October 29th, 1907.

Pursuant to adjournment commission met on October 28th, 1907, and continued the taking of testimony. Adjournment taken at 3:30 P. M. until 9 A. M. October 30th, 1907.

Pursuant to adjournment commission met on October 30th, 1907, and continued the taking of testimony at the hour and place above specified.

Hearing was then adjourned.

102 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, its Relator, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Ordered: That the above named case be set for argument on January 14th, 1908, at 1 o'clock p. m. at the office of the Railroad Commission of Oregon in the Capitol, at Salem, Oregon.

Dated at Salem, Oregon, January 3, 1908.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOMAS K. CAMPBELL,
OSWALD WEST,
Commissioners.

Attest:
(Signed) GEO. O. GOODALL,
Secretary.

[Seal of Railroad Commission of Oregon.]

I dissent from so much of the foregoing order as fixes Salem as the place of hearing.
(Signed) CLYDE B. AITCHISON,
Commissioner.

103 And on, to-wit, January 13th, 1908, the said commission entered the following order, to-wit:

Ordered: That the date for hearing arguments in the above entitled cases, heretofore set for January 14, 1908, at Salem, Oregon, be changed to January 17, 1908 at 2 p. m. at Room 14 Newmarket Building, Portland, Oregon.

And on the said 13th day of January, 1908, the counsel for plaintiff and defendant were duly notified orally of the time and place when and where said argument would be had.

And on, to-wit, January 17, 1908, the above entitled matter was fully argued by counsel and submitted.

And on January 30, 1908, the said commission duly made and entered the following findings and order, to-wit:

104 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY, a Corporation, Defendant.

Copy.

Order.

Now on this 30th day of January, 1908, this matter comes on before the above named commission for final determination and order, having heretofore been fully submitted; and the commission having heard and examined the complaint of the plaintiff, the answer of the defendant, the evidence and proofs offered, the arguments of the counsel, and being fully advised in the premises, finds:

(1) That the defendant Portland Railway Light and Power Company is a corporation organized under and existing by virtue of the laws of the state of Oregon and owns and operates by electric power a railroad or interurban railroad as a common carrier in this state, between First and Alder Streets in the city of Portland, and Canemah, Clackamas County, Oregon, (known as the Oregon City division) and also a line of railroad from said First and Alder Streets to Lents Junction, Multnomah County, Oregon, (known as the Mount Scott division) and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Cazadero in Clackamas County, Oregon, (being known as the Springwater division) the station of Nickum being situated on said last mentioned line of railroad outside the corporate limits of the city of Portland, Oregon.

(2) That the plaintiff is a voluntary association of persons residing in and about stations on the lines of the defendant known as Milk kee Heights, Courtney, Oak Grove, Center and Risley, the same being on the Oregon City Division thereof; and that B. Lee Paget is the President of the said association and prosecutes this proceeding on its behalf.

105 (3) That the said defendant makes the following charges and collects the following fares, to-wit:

Between Portland and

On Oregon City Division.

Golf Junction (within city of Portland)	5.36	miles	5	cents.
Lambert	5.93	"	10	"
Knight	6.29	"	10	"
Hendee	6.44	"	10	"
Milwaukee	6.71	"	10	"
Island	7.05	"	10	"
Milwaukee Heights	7.70	"	15	"
Courtney	8.30	"	15	"
Oak Grove	8.48	"	15	"
Center	8.68	"	15	"
Risley	9.26	"	15	"

On Mt. Scott Division.

Reservoir (within city of Portland)	4.69	"	5	"
Lents	7.69	"	5	"
Lents Junction	8.31	"	10	"

On Springwater Division.

Golf Junction (within city of Portland)	5.35	miles	5	"
Nickum	6.51	"	5	"
Kerrigan	7.26	"	10	"
Bell	8.51	"	10	"
Kendall	9.32	"	10	"
Lents Junction	10.71	"	10	"
Gilbert	11.65	"	10	"
Gates	12.38	"	10	"
Wilson	13.00	"	15	"
Sycamore	13.48	"	15	"
Jenne	14.43	"	15	"

Between Golf Junction and

On Oregon City Division.

Lambert	.57	miles	5	"
Knight	.93	"	5	"
Hendee	1.08	"	5	"
Milwaukee	1.35	"	5	"
Island	1.69	"	5	"
Milwaukee Heights	2.34	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"
Risley	3.90	"	10	"

On Springwater Division.

Nickum	1.15	miles	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
106 Wilson	7.64	miles	10	cents.
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

(4) That the said rates, fares and charges demanded and collected by the defendant of and from persons traveling in either direction between Lents and Lents Junction and First and Alder Streets in the city of Portland, On the Mount Scott Division, and between Nickum, Kerrigan, Bell, Kendall, Lents Junction, Gilbert and Gates and said First and Alder Streets on the Springwater di-

vision of the defendant's railroad are unjustly discriminatory against the plaintiff association and the members thereof, and the Relator, B. Lee Paget, who travel between Milwaukee Heights, Courtney, Oak Grove, Center, and Risley, and said First and Alder Streets.

(5) The Commission further finds that from points on the Mount Scott division without the city of Portland the defendant furnishes to passengers who pay fare to First and Alder Streets in the city of Portland certain transfers entitling the holder thereof to transportation over certain other lines of railroad and street railway, and that such transfers are not furnished to the plaintiff association and the members thereof, and the Relator B. Lee Paget, when traveling and paying fare from Milwaukee Heights, Courtney, Oak Grove, Center and Risley over the defendant's line of railroad to First and Alder Streets in the city of Portland, Oregon. The commission further finds that this practice and regulation of the defendant is unreasonable and unjustly discriminatory against the plaintiff association and the members thereof, and the Relator, B. Lee Paget.

(6) The commission further finds that the existing fares and charges of the defendant between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, Oregon, to-wit, the sum of fifteen cents for a single passage in either direction is unjust and unreasonable, and that a just and reasonable fare and charge for the transportation of persons in either direction between First and Alder Streets in
107 the city of Portland and said points would be the sum of ten cents.

It is therefore Ordered, Considered and Determined, that the said Portland Railway, Light and Power Company shall cease and desist from demanding, charging, collecting or receiving for the transportation of persons between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, Oregon, in either direction the rates, fares and charges set out in its Tariff O. R. C. No. 1, viz: fifteen cents; and that the said Portland Railway, Light and Power Company shall charge, impose and collect the following rate, fare and charge in lieu thereof, viz: ten cents.

It is further Ordered, Considered and Determined, that the said defendant shall cease and desist from refusing to passengers traveling between Milwaukee Heights, Courtney, Oak Grove, Center and Risley and First and Alder Streets in the city of Portland, in either direction, the same transfer privileges which are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, in either direction, and that the said defendant shall furnish to all persons who shall pay the said rate of ten cents as aforesaid the same transfer privileges as are accorded passengers traveling between Lents and First and Alder Streets in the city of Portland, Oregon, in either direction.

It is further Ordered, Considered and Determined, that the said rates so fixed and determined, and the said practice in regard to transfers shall be imposed, observed and followed in the future in

lieu of those herein found to be unjust and unreasonable and unjustly discriminatory; and that the said defendant shall, within thirty days from the date of the service of a certified copy of this order upon an officer or station agent of said defendant, make such changes in its schedules on file with this commission as may be necessary to make the same conform to this order, and that the said rates and regulation as to transfers shall of themselves take effect and become operative thirty days after such service.

The privileges and order herein are predicated upon the
108 defendant continuing to offer to the traveling public the 20 ride commutation rates schedules on page 4 of its Tariffs O. R. C. No. 1, and if the defendant should withdraw such commutation rates between the points covered by this order, the right is hereby reserved to the plaintff to move for a re-hearing hereof.

Dated at Salem, Oregon, this 30th day of January, 1908.

RAILROAD COMMISSION OF OREGON,
(Signed) By THOS. K. CAMPBELL,
" OSWALD WEST,
" CLYDE B. AITCHISON, *Commissioners.*

Attest:
(Signed) GEO. O. GOODALL, *Secretary.*

109 And on February 1, 1908, the defendant, Portland Railway, Light and Power Company duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) DAN J. MALARKEY,
Attorney for P. R. L. & P. Co.

Endorsed as follows: Railroad Commission of Oregon. Filed Feb. 7 1908. Geo. O. Goodall, Secretary.

110 And on February 1, 1908, the plaintiff, The Oak Grove Improvement Association, duly accepted service of a duly certified copy of the said order by filing with the commission its acceptance of service in words and figures following, to-wit:

Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Due and legal service of the order in the above entitled case is hereby accepted and a copy thereof received this 1st day of February, 1908.

(Signed) R. C. WRIGHT,
Attorney for Plaintiff.

Endorsed as follows: Railroad Commission of Oregon. Filed Feb. 3 1908. Geo. O. Goodall, Secretary.

111 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, by B. LEE PAGET, as Relator, Plaintiff,
vs.
THE PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Amended Order.

And now on this 11th day of April, 1908, this matter comes on again before the Railroad Commission of Oregon upon the order of the Honorable Circuit Court of the State of Oregon in and for Marion County, made and entered in the case entitled Portland Railway Light and Power Company vs. Railroad Commission of Oregon, which said order remands the above entitled matter to the said Commission for further consideration, pursuant to the provisions of Section 34 of Chapter 53 of the laws of Oregon for the year 1907.

The plaintiff appears by Giltner & Sewall, its attorneys and the defendant appears by Fred'k V. Holman and Franklin T. Griffith its attorneys.

And the Commission having heard and considered the original evidence taken before it, and the additional evidence remanded to it by the said Circuit Court, and also the arguments of counsel for the respective parties, amends its former findings and order in the following respects and none other, to-wit:

First, by adding to Paragraph 4 of the said findings and order the following, to-wit: "and unjustly discriminatory against the

localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

Second, by adding to Paragraph 5 of the said findings and order the following, to-wit: "and unjustly discriminatory against the localities of Milwaukee Heights, Courtney, Oak Grove, Center and Risley."

112 In all other respects the order hereinbefore entered by the said Commission in the above entitled matter remains intact and unchanged.

The said original order, is hereby referred to and made a part hereof.

It is further ordered that a certified copy of this order, together with the transcript of evidence and of the proceedings transmitted by the said Circuit Court to this Commission shall be returned by the Secretary of this Commission to the said Circuit Court forthwith, as the report of the said Commission of its action thereupon.

It is further ordered that a certified copy of this order be served upon the plaintiff and defendant herein.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:
GEO. O. GOODALL,
Secretary.

113 STATE OF OREGON,
County of Marion, ss:

We, Thos. K. Campbell, Oswald West and Clyde B. Aitchison the members and commissioners of the Railroad Commission of Oregon do hereby certify that the foregoing is a true and correct transcript of all proceedings had in the above entitled matter.

And we hereby certify that the transcript of testimony certified to by F. Roy Davis, Official Stenographer of the said Railroad Commission of Oregon, is a full, true and correct transcript of the testimony taken upon the investigation made in the above entitled matter, which said transcript is hereby made a part hereof

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

Attest:

[SEAL.] E. G. MILLER,
Acting Secretary.

114 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION
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No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, Plaintiff,
v.
PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

Transcript of Evidence.

At the hearing of the above entitled matter before the Railroad Commission of Oregon, begun at the hour of 11:00 o'clock in the forenoon on the 28th day of October, 1907, in Room 14 at Number 7 First Street in the city of Portland, Oregon, the following evidence was offered and received, and the following proceedings were had, to-wit:

Present: The Chairman, Thos. K. Campbell, and commissioners Oswald West and Clyde B. Aitchison, and the stenographer, F. Roy Davis.

The said Portland Railway Light and Power Company appears by Mr. F. I. Fuller, Vice President and its Attorneys Dan J. Malarkey and E. B. Seabrook.

The said The Oak Grove Improvement Association appears by B. Lee Paget as its Relator, and its attorney R. C. Wright.

Mr. WRIGHT: Shall we introduce any tariffs in evidence or——

Mr. AITCHISON: We use all tariffs filed with the commission for reference and you can simply refer to any particular tariff you desire and it will be considered in evidence.

Mr. WRIGHT: I suppose the commission is familiar with the issues involved in this Oak Grove case, and while I would like to make a statement, I will omit doing so on account of these witnesses, and if it is agreeable to the commission I will call them right away?

Mr. AITCHISON: Call your first witness.

117 Mrs. M. EATON, a witness produced on behalf of the plaintiff, being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT.

Q. Where do you live, Mrs. Eaton?

A. At Lents, Oregon.

Q. How long have you lived there?

A. Eight years the first of January.

Q. Now it might be profitable to show to the commission and the counsel on the other side that they have taken issue with us on statements we make that our place has been deprived of opportunities for development against other place and of course it will be understood we may have time to argue upon the admis-ability of this fact later on, if that is agreeable, but I would like to get it in now and——

Mr. MALARKEY: What is this testimony. It can be understood that we object to all of that. The commissioners—You want to prove that Lents is a better town than Oak Grove on account of five-cent fare?

Mr. WRIGHT: Yes sir.

Mr. MALARKEY: Very well, but later on——

Mr. WRIGHT: Were you Secretary of the School District out there at any time?

A. For two years.

Q. What time was that?

A. I was elected in June, 1905, and again in June, 1906.

Q. Have you the records of the School District with you?

A. I have some of the records.

Q. Now, in order to save the calling of other witnesses, Mrs. Eaton, who is thoroughly familiar with the statistics—school statistics—can testify to them unless you insist upon the direct transcripts of those records. If you do, of course we will have to get them.

Mr. MALARKEY: What do you prpoose to show by Mrs. Eaton—as to the number of school children?

Mr. WRIGHT: Yes sir.

Mr. MALARKEY: Well, we do not see the materiality of it. We do not see the——

118 Mr. AITCHISON: Why not let the testimony go in upon the part of the defendant, as to the competency of it, the defendant reserving the right to object to the relevancy of the evidence.

Mr. MALARKEY: Some of it will be objected to by the defendant on account of hearsay evidence.

Mr. AITCHISON: Then you do not object to the school reports?

Mr. MALARKEY: We do not object to the material evidence.

Mr. WRIGHT: In 1901 state how many teachers you had at Lents, what your enrollment of pupils was and what the census?

A. In 1901 we had two teachers; the census was 107; enrollment 90 and only two rooms.

Q. What district was that known as for some time?

A. That had been the condition for some time. It was called District No. 12.

Q. And what territory did that district embrace?

A. All of what was consolidated with No. 1 last June as No. 12 and almost all of what is now Arleta.

Q. What did No. 12 consist of originally then.

A. That was what it was.

Q. You say all of No. 1 last year?

A. All annexed to No. 1 as No. 12. The district was about three miles long and I think about two miles wide as annexed last June.

Q. Did it include the town of Lents and vicinity?

A. Yes sir.

Q. And did it include Arleta?

A. Nearly all of it.

Q. And now in 1902 state?

A. In 1902 we had two teachers; census 124; enrollment was not given for that year and we still used only two rooms. That year our school house burned.

Q. Were you elected for that year?

A. No sir.

Q. You lived there?

A. Yes sir.

Q. What do you think the enrollment was on a census of 124?

A. It was probably about 100.

119 Q. What size building did you have there in 1901 and 1902 up to the time it burned?

A. Just two rooms.

Q. State in 1903 what the district furnished in the way of school facilities, and the enrollment and census?

A. They built a four-room school house and employed three teachers; census that year was 254—in 1903.

Q. In 1903?

A. In 1904—I have not 1903. There was no report for that year.

Q. I am asking about 1903 now.

A. It was between 1902 and 1903 we built the school house.

Q. Now, in 1904 what was the size of your building, number of teachers, enrollment and census?

A. We had the four rooms in 1904 and we had three teachers. That was what I just gave you.

Q. Those last statistics?

A. Yes sir.

Q. Now take 1905?

A. We had five teachers, census 415 and only four rooms.

Q. What was the enrollment?

A. I do not know the enrollment.

Q. Well, did you have occasion to get extra room in that year?

A. They rented an outside building.

Q. For school purposes?

A. Yes sir.

Q. In 1906 state how many teachers you had?

A. Eight.

Q. And your enrollment?

A. The enrollment I haven't—census was 505.

Q. Was the building increased that year?

A. We built six more rooms, making ten rooms.

Q. Is that the present size of the building?

A. Yes sir.

Q. In 1907 state?

A. Eleven teachers.

120 Q. And what was the enrollment and census?

A. Census 633.

Q. Have you all the room you need in the school there now?

A. We are very crowded—getting along but that is all.

Q. How many should they have in the rooms you have in use there at present?

A. Some of the rooms have 50 pupils in now.

Q. How many should they have to make conditions sanitary?

A. Not over 40.

Mr. WRIGHT: Take the witness.

Cross-examined by DAN J. MALARKEY:

Mr. MALARKEY: No cross examination.

Mr. AITCHISON: The people in this district you have spoken of all use the station at what point—Lents?

A. No, would have to use stations at the different points on the line.

Q. On the Lents line?

A. On Mount Scott line.

Mr. WRIGHT: Those people that she has just referred to—are they within the five cent fare limit?

A. According to contract with the company; yes sir.

Mr. MALARKEY: According to the contract of the company when they took the rolling stock?

A. In 1902.

Q. And you think the company took the rolling stock about 1902.

A. Yes sir. The cars were taken off in 1902, about the first of the year.

Q. How long have you lived out there, Mrs. Eaton?

A. Eight years next January.

Q. You were living out there before the cars were taken off at that time?

A. Yes sir.

Q. The cars were off for a while and before the company would put them back on the people out there owning property along the line between Portland and Lents made some concessions between them?

A. Yes sir.

Q. Didn't they, as a matter of fact, give them the line
121 by——

A. (Interrupting.) Yes sir, and gave them money besides, and the company agreed to maintain a five cent fare to any part of Portland.

Q. They were wise people out there.

A. Yes sir.

Q. Now, this school district that you have referred to is larger than the town of Lents, isn't it?

A. Yes sir, considerably.

Mr. WRIGHT: That is the district you are asking about?

Mr. MALARKEY: Yes sir.

Q. When you testify, for instance, that in 1906 there were eight teachers and a census of 505 in a ten-room building you mean there were eight school teachers in this district and 505 within the boundaries of that district, and that that district was served by a ten room building—you don't mean that there were 505 children in the town or district?

A. No sir.

Q. What are the boundaries of that district?

A. Section line road on the north to Clackamas County on the south?

Q. From the section line road on the north to Clackamas County on the south?

A. Yes sir.

Q. What is the distance across?

A. About two and a half or three miles.

Q. Two and a half or three miles north and south?

A. Yes sir.

Q. As to the east and west boundaries—where is the western boundary?

A. It is what is known as Wooden Street, between Woodmere and Tremont.

Q. Tremont is over here in the city, is it not?

A. It is half-way between Woodstock and Woodmere.

Q. Now, that is the western boundary—where is the eastern boundary of the district?

A. I think about 1½ or 2 miles east of there. Just east of Lents Junction.

Q. Do you know where Gilbert is?

A. Yes sir.

Q. Is Gilbert in that school district?

A. Gilbert is the center of District 45.

122 Q. What is the number of the district you refer to?

A. No. 12.

Q. There are a number of stations along the road from which children go to the Lents school house?

A. Yes sir.

Q. And do children go to Lents school house from stations west of Tremont?

A. No, that is another district.

Q. What stations are there from Lents to——

A. Third Ave., Sixth Ave., Ninth Ave., Grays Crossing, Reyburn Ave. and Woodmere.

Q. And these are all little stations at which the cars stop, are they not?

A. Just the same as in the city.

Q. The municipality of Lents does not complain, does it?

MR. AITCHISON: Lents is not a town—they have been trying to get incorporated as Arleta.

Re-examination by R. C. WRIGHT:

Q. Mrs. Eaton, you were asked about this contract, which came up incidentally—Do you know anything about them making a contract?

A. We had to make a contract to get cars at all—we had no cars for six months.

Q. Were you present when any negotiations were going on between the company and the people?

A. No sir.

Q. You don't know of your own knowledge what was said pro and con regarding the matter.

A. I saw the agreement people signed that they would pay this money.

Q. Was there any club or axe taken to force people to sign this contract?

A. I was not there to see.

O. R. ADDITON a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Additon?

A. Lents, Oregon.

123 Q. How long have you lived there?

A. The last time I have been there about six years. I lived there before that.

Q. You went there first in what year?

A. In 1893.

Q. Well, in 1901, how many stores were there in Lents?

A. I think only one——

Mr. MALARKEY: Of course, this is all understood that we object to the materiality and relevancy?

Q. What stores were there?

A. One, old Lents Corner owned by Mr. Gardner, and one by a lady, Mrs. Kerrigan—Grocery store.

Q. Since 1901 what number of stores have been put in there up to the present time?

Q. I have a list here. (Produces and examines document.)

Q. You may refresh your memory by calling off from your list—total number?

A. Forty three.

Q. Segregate them if you will, please. How many stores?

A. One ten room school, four drays, one physician, two —, four real estate offices, one hotel, one fuel company, six grocery stores, drug store, bakery hardware store, meat market, restaurant—two restaurants, livery stable, blacksmith shop, harness shop, shoe shop, billiard room, two wood says, two blacksmith shops, one woodyard, two physicians, one band and several lodges.

Q. Were all those establishments you speak of established since 1901?

A. Yes sir.

Q. Is there a local paper that circulates there?

A. None that circulates there, one established in Arleta.

Q. Is that the paper? (Indicates a newspaper.)

A. That is the paper.

Q. Do you take this paper yourself?

A. I do; yes sir.

Q. Do the Lents people advertise in this regularly, do you know? This is the issue of Sept. 12th, 1907. There is an editorial

124 on the first page, do you remember reading that?

A. I do not remember reading it.

Q. (Handing witness copy of paper.) Just look at that and tell us if you have read that article.

Mr. MALARKEY: Why should this commission wait while the witness reads a paper? I cannot see any reason why they should. I certainly am going to object.

Q. What have you to say in regard to the statements made in

this paper about the development and prosperity of that community?

Mr. AITCHISON: Let the witness testify.

Mr. MALARKEY: I object to that as being incompetent, immaterial and irrelevant.

Mr. AITCHISON: We will let the paper go in.

Mr. WRIGHT: We will introduce that peper. You have just read that article, Mr. Additon, are the statements correct or are they not?

Mr. MALARKEY: I object to that——

Mr. AITCHISON: That has been ruled upon. This is not a work of science.

Mr. MALARKEY: Let the witness tell what he knows about that.

Mr. AITCHISON: The paper may go in for what it is worth and will make it plaintiff's exhibit 1.

Mr. WRIGHT: Just look at all of these papers and say whether or not you have seen them before?

Mr. MALARKEY: If your Honor please, we would like to have your ruling on our objections. We object and we reserve the right to review. Upon what theory under the sun are these things offered?

Mr. WRIGHT: I have told you we wish to show that Lents has gone ahead on a five cent fare while Oak Grove has not gone ahead.

Mr. MALARKEY: If it does any good for the purposes of this case we will admit that Lents is bigger. What do you mean by "Lents", you say Lents is not a municipality? We learned from the lady who was upon the witness stand last that Lents embraces an area between two and a half and three miles north and south?

Mr. WRIGHT: That was District No. 12—not Lents.

125 Mr. MALARKEY: What is Lents?

Mr. WRIGHT: There is a little station out there run by your clients—that is Lents. There is a certain district of people who get on at a station called Lents.

Mr. AITCHISON: You have not given us any testimony to show the relative advancement of those communities.

Mr. WRIGHT: I have been interrupted so that I have not had more than time to introduce those circulars, and——

Mr. MALARKEY: I think that time might be saved by——

Mr. AITCHISON: What is your objection?

Mr. MALARKEY: We object to the line of testimony because the transportation to and from Woodmere and various other points, or the amount of real estate sold or unsold is not relevant to any of the issues involved here. If you want to show that Lents is prosperous, or that Lents is a larger place than Oak Grove, we will admit it.

Mr. WRIGHT (referring to answer to complaint): Now you have denied that one district here was more prosperous than another——

Mr. AITCHISON: The commission is ready to rule on the question: Evidence to show that one community has *been* prospered and another has not when that can be traced to a five cent fare or

ten cent fare is relevant, but we hardly think that this testimony—exhibits 2 to 6 are competent.

Mr. WRIGHT: I will say, if the commissioners please, I cannot get it in all at once. If I can get along further I can show it. Mr. Additon, were you in the real estate business?

A. I am, yes sir.

Q. How long have you been in that business?

A. About five years.

Q. Where have you been in that business?

A. At Lents, Oregon.

Q. Do you know the times that these different additions here—Woodmere, Arleta Park No. 2, Laurelwood, Firland and
126 Evelyn—were placed on the market for the sale of lots?

Mr. MALARKEY: I understood those matters the commission ruled——

Mr. AITCHISON: Give him a little lead to see if he can get that clear.

Q. You were there at the time and saw them placed on the market?

A. Yes sir.

Q. Have you, yourself, sold any lots in those additions?

A. I believe I sold a few in Arleta Park No. 2.

Q. You sold a few in Arleta Park No. 2 yourself?

A. Yes sir. Mostly what I sold out there were my own additions which I laid out myself.

Q. Which ones?

A. Evergreen Park, Abington, and then I laid our Mount Scott; part for parties who were non residents. Mount Scott however I laid out.

Q. Are these additions here in the vicinity of Lents? These we have just mentioned the advertisements of?

A. Well when we speak of Lents—Lents runs along from where the station is, runs east about half a mile and it is longer the other way. Lents proper, what is called Lents and the plat of Lents only shows I think somewhere about—not over twenty——

Q. You are speaking now of the plat of Lents?

A. Yes sir.

Q. I am drawing your attention to the station called "Lents" and the community which is generally known as Lents?

A. Well, there is only one Lents Addition and the other property adjoining it is——

Mr. WRIGHT: You don't understand my question: I am speaking not of the addition but of the community known as Lents. What district does that embrace?

A. Well, it would be hard to tell where it begun or where it left off.

Q. Do people living in these additions of which you have shown advertisements go to Lents to get on?

A. No sir.

127 Q. Do any of them?

A. Arleta Park No. 2 mostly go to Lents to get on.

Q. People from Arleta Park No. 2 mostly get on at Lents?
A. Yes sir, get on at Lents. 4th Ave., 6th Ave., Woodland Tract and 9th Ave.
Q. How far away are these little avenues you speak of?
A. About three blocks.
Q. Do people get on there from these additions—people who live in these additions—in the same manner that people get on the cars at the different blocks in the city of Portland?
A. Yes sir.
Q. Have you ever represented to prospective purchasers out there when trying to effect the sale of lots that they were five cent fares to Lents?

Mr. MALARKEY: I object to that as being incompetent, irrelevant and immaterial.
Mr. AITCHISON: Answer the question.

A. I have certainly always told them we had five cent fare.
Q. How far away from Lents station do the people who live at Laurelwood Addition, Firland, Evelyn and Woodmere take the cars of the defendant railroad to Portland?
A. Laurelwood and Milwaukee Ave. West get on the car all along the line—stations every short distance.
Q. Are there any other people engaged in the real estate business living at Lents or near the station?
A. Yes sir.
Q. Did you look at the statements made on these advertisements in regard to five cent fares; for instance, there is one?

Mr. AITCHISON: What are you handing the witness?
Mr. WRIGHT: Exhibit 3.

Q. Is that the general character of statements and representations made to prospective purchasers in and about Lents?
A. Yes sir; alluded to always.
Q. Is that a fair sample that is on these circulars here made by yourself and other real estate agents out there?

128 Mr. MALARKEY: We object to that. I do not see the relevancy. We object to this question. If this is a fair sample I object to this question.
Mr. AITCHISON: The objection is good.

Q. Withdraw the question and state it this way. Do you know, and if so, state whether or not prospective purchasers of lots in and about Lents are induced to buy those lots either in transactions made by yourself or by other real estate agents of which you have knowledge on the strength of representations regarding the five cent fare like those on these circulars?

Mr. MALARKEY: That would be a matter of hearsay testimony. That is the finding that is to be made by this commission and we object to the question.
Mr. AITCHISON: I think, provided it was not tied up, provided it was not so——

Mr. MALARKEY: Just let him ask what are the facts. What did you say?

Q. Did you ever make a statement like this to any prospective buyer of lots in and about Lents?

Mr. AITCHISON: Just let him tell in his own way. You may state in the language you use when you are talking about five cent fares.

A. It would be about on the same line as an advertisement would be. You see on these circulars a fair sample of what we tell them. We confine ourselves to the truth and do not exaggerate.

Mr. AITCHISON: Do you tell them you have five cent fare and other places do not have five cent fares? The long and short of it is you have five cent fares there and it is advantageous for them to buy where there is a five cent fare?

A. As far as the fare is concerned and other things being considered.

Mr. WRIGHT: Now, in regard to water works out there at Lents. Has there been any increase in capacity of water works?

Mr. MALARKEY: I object to the question as irrelevant, immaterial and incompetent. They are all argumentative—the fact to be proved is not that Lents has grown under five cent fare.

Mr. WRIGHT: So far as it being argumentative is con-
129 cerned, I never say anything so argumentative as this answer.

Mr. MALARKEY: They are all facts.

Q. State Mr. Additon the extent in either direction that Lents has grown due to the distance it is from the city and the lowness of the fares.

A. I do not know as I could say how much difference. In regard to the water works, we have two systems there. One is owned by Mr. Coffman. He has probably added $2,000.00 or $3,000.00 to his plant in the last two or three months. There is a demand and he has to supply the demand.

Q. State whether or not people are buying residences freely at Lents?

A. Well, there are several being sold every week.

Q. Is the market good there for the sale of property in and about Lents?

A. There is a demand for the property and a good many sales—you mean in houses and lots?

Q. Yes sir.

A. Yes sir, houses and lots, more especially lots.

Q. State whether or not there are more lots being sold there than acreage?

A. Yes sir.

Mr. WRIGHT: You can cross examine.

Cross-examination by DAN J. MALARKEY:

Q. Do you know where Nickum is?

A. An addition is——

Q. No, did you ever hear of Nickum?

A. It is on the Oregon City line.

Q. Don't you know where it is? A. Pretty nearly.
Q. Have you ever been at Nickum?
A. I have been past there but I never stopped there.
Q. What line is that on?
A. I suppose it is on the Oregon City line.
Q. That is as much as you know about Nickum then—that you think it is on the Oregon City line?
A. Yes sir.
Q. And you are a real estate man?
A. Yes sir.
130 Q. And you have been selling real estate?
A. Yes sir.
Q. And you have sold real estate on the other side of Lents too, haven't you?
A. East; yes sir.
Q. And you have sold lots on the Springwater division, have you?
A. Not a great ways out, no sir.
Q. You know where Lents Junction is, do you?
A. Yes sir.
Q. And you have sold lots between the Springwater division and what is known as Golf Junction?
A. No sir. That is on the Estacada line you mean?
Q. Yes sir.
A. No sir, I have not.
Q. You have ridden on that line haven't you?
A. I have never ridden on the Estacada line yet between Lents and Portland.
Q. And you do not know where Nickum is?
A. Well, I suppose it is somewhere on the Oregon City road.
Q. Did you ever hear of it?
A. Yes sir.
Q. What sort of a place is Nickum?

Mr. AITCHISON: You can develop that better elsewhere.
Mr. MALARKEY: I wanted to find out———
Mr. AITCHISON: He does not seem to show any competency on that point.
Mr. MALARKEY: That is just the point.
Mr. AITCHISON: I mean as to Nickum.
Mr. MALARKEY: Yes sir. That is all.

G. A. BRODIE.

G. A. BRODIE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Mr. Brodie, where do you live?
A. I live about four miles east of here on the Powell Valley road.
131 Q. How long have you lived there?
A. Eighteen years.

Q. Were you formerly an officer and stockholder in what was known as the old Mt. Scott road—I don't know the name?

A. Portland, Chicago and Mount Scott Railroad, secretary.

Q. When was that?

A. That was about eight or ten years.

Q. Is the corporation still in existence?

A. It has never been dissolved.

Q. Are you still secretary?

A. Yes sir.

Q. Did you know at one time of there being made a contract out there in regard to five cent fares?

A. Yes sir.

Q. State whether or not the company voluntarily entered into that contract?

A. I presume they did—I don't know of any compulsion.

Q. Did you live out there in 1901?

A. Yes sir.

Q. Well, do you know whether—do you know anything about the state of traffic on that road just before this company or its predecessor took possession and ran it.

A. Yes sir.

Q. What was the traffic on that road at that time? Passenger traffic?

A. The passenger traffic was light. Car every hour and sometimes two or three passengers and sometimes not that until late in the day. At other times the cars were reasonably full.

Q. Were the cars over crowded at that time?

A. Not at all.

Mr. MALARKEY: Can you tell when that change was?

A. April 30, 1901.

Mr. WRIGHT: At the time the contract was made and the old O. W. P. took the road to run, did you notice the state and condition of the passenger traffic on the road after that?

A. Yes sir.

Q. You may state to the commission whether the passenger traffic has increased or decreased up to the present time?

132 A. Considerable increase all the time.

Q. Give the details as to the figures—number of cars, etc.

A. When they first put on cars they ran every half hour. Of course there were not very many people out there then. Began to grow very rapidly and then they put on twenty minutes service which has since been reduced to fifteen minute service, which they have now. Run cars very full now sometimes, as many as 125, 130 or 140 on a car.

Q. (Handing witness newspaper clipping.) There is a clipping from the "Oregonian" stating that cars were crowded there. State the facts in regard to the matter referred to in that clipping?

Mr. MALARKEY: We object to that because——

Mr. WRIGHT: We simply want to show there was a big traffic.

WITNESS: I have testified to that.

Mr. WRIGHT: Well, I want you to state as to the extent these cars are crowded.

A. I have stated they carry from 120, 125 or 130 at the present time.

Q. They carry 120, 125 or 130 passengers at the present time?

A. Yes sir.

Q. How about the traffic through the day?

A. Always full, even during the noon hour. Hardly get standing room on them—I mean during the noon hour hardly get sitting room.

Q. What is the regular time during rush hours?

A. Three and four minutes, and sometimes run trailers on them.

Cross-examined by DAN J. MALARKEY:

Mr. MALARKEY: You were the Secretary of the Portland, Chicago and Mount Scott Railroad, were you not?

A. Yes sir.

Q. And as such secretary you executed this contract in behalf of that company which I now exhibit to you (Exhibit No. 2)?

A. I signed a contract, I presume that is the same one.

Mr. WRIGHT: I wish to make objection of record to it, so that we don't pass it by. I don't want it understood that I admit it.

Mr. MALARKEY: And this is the contract to which you have referred in your testimony in answer to question propounded
133 to you by the attorney for the plaintiff, is it not?

A. I *that* that is what he referred to.

Q. (Extending Exhibit 2.) Look at this. Now, I want you to say whether or not this is the contract?

A. I referred in my answer to both contracts. The contract we first made was with the East Side Railway Company, and when this East Side Railway was sold to Morris Bros. and they threw up their contract and made this new one here themselves.

Mr. WRIGHT: This is part of their case and I think it is properly introduced when they put in their own evidence.

Mr. MALARKEY: Upon cross examination could we not show what contract or kind of contract the witness referred to? As a matter of fact your question really was not proper until you showed what contract you referred to.

Q. Mr. Brodie, have you—The Portland, Chicago and Mount Scott Railroad was organized principally by people who resided between Portland and Lents?.

A. Yes sir, that is correct.

Q. And the road they built extended from a point on Hawthorne Ave. out to Lents?

A. Yes sir.

Q. And the road which this Portland, Chicago and Mount Scott Railway Company so built from a point on Hawthorne Ave. to a point out to Lents is substantially along the same route as is now

maintained by the Portland Railway Light & Power Company over which its cars run from Hawthorne Ave. to Lents?

A. Yes sir.

Q. Now, drawing your attention in this connection, Mr. Brodie, to a plat which I now show you, and which is marked Exhibit 7——

Mr. WRIGHT (interrupting): The plaintiff does not admit the correctness of that map.

Q. I will ask you if the black line commencing First & Alder Sts. and continuing on out where marked Mount Scott Division with dotted line and running thence to Arleta, and thence to Lents, thence to Lents Junction, does not substantially represent the general
134 course and direction of the street car line as now operated by the Portland Railway Light and Power Company from 1st and Alder Streets to Lents and Lents Junction?

A. Yes sir. I don't know about the scale.

Q. Disregarding the matter of scale measurements I will ask you if this map does not substantially show the direction and route and distances.

A. Yes sir, I answered that.

Q. Between First and Alder streets and Lents Junction?

A. Yes sir.

Q. Now, I will ask you if the line as constructed and operated by the Portland Chicago and Mount Scott Railway Company as shown on the map as Mount Tabor Junction and run in this general direction to Lents? What is the distance, do you remember, approximately from Mount Tabor Junction to Lents?

A. 4½ to 5 miles.

Q. And this point which is marked Mount Tabor Junction is about at 48th Street and Hawthorne Ave.?

A. Yes sir.

Q. Now I will ask you if you are familiar with the general location of the Springwater division?

A. I have been on the line several times.

Q. Are you in a general way familiar with the Oregon City line which leaves 1st and Alder Sts. and then goes up on the east bank of the Willamette River to Golf Junction and thence to Oregon City?

A. I have been over it a number of times.

Q. Drawing your attention to plat marked plaintiff's exhibit 7. I will ask you if this shows in a general direction, not claiming that it is true to scale or shows the curves, the general direction of this defendant company's line—the Mount Scott division, to Lents Junction and then on out to Cazadero; and the one in blue, red and then blue—black, and marked Oregon City division is the line to Oregon City?

A. I presume for your purposes. The general direction is
135 not exactly right.

Q. The general direction is south?

A. Yes sir.

Q. We will now offer this plat marked exhibit 7 in evidence.

Mr. WRIGHT: We object to it as being incompetent, immaterial and irrelevant and as not made by a competent map man.

Mr. AITCHISON: Objection overruled.

Q. Mr. Brodie, when did the Portland, Chicago and Mount Scott Railway stop operating its line?

A. They never did operate it; they turned it over to the East Side Railway Company and they operated it.

Q. How long did the East Side Railway operate it?

A. Three or four years.

Q. Now, that was a different concern from this Portland City and Oregon Railway, was it not?

A. Yes sir.

Q. Refreshing your memory and to assure the commission, I will ask you if it is not a fact that it was a separate concern?

A. Separate concern altogether. Bought out the East Side Railway Company at foreclosure sale.

Q. The East Side Railway Company operated for three or four years and then they abandoned the line?

A. Somebody bought the East Side Railway Company's property and they refused to carry out the contract which the East Side Railway had with the Portland, Chicago and Mount Scott Railway Company and the line came back to the Mount Scott people.

Q. Then when they threw it up and the people who bought the track and refused to go on with it, how long was the period between then and the time this contract was made with this Portland Railway Light and Power Company?

A. They abandoned it the 1st of January and I think that 's dated 30th of April, is it not?

Q. Yes sir. It is dated April 30th. How long a period
136 during which there were no cars operated?

A. Cars operated within—first cars about six months.

Q. From approximately 1st of January, 1901, to 1st of July, 1901?

A. Yes sir.

Q. What fare was charged by the East Side Railway Company during the time it operated this line?

A. There was a provision in the contract with the East Side Railway whereby all subscribers were entitled to five cent fares.

Mr. WRIGHT: I move that be stricken out as incompetent, immaterial and irrelevant as part of the defense and not a proper cross examination.

Mr. MALARKEY: You went into the question of these fares and in order to——

Mr. AITCHISON: It does not matter how much to us as long as we get these facts.

Mr. MALARKEY: Are you ashamed of your witness?

A. No sir, he is a good looking man.

Mr. AITCHISON: I think these circulars have never been submitted in evidence? We will take it up later when you get done with the witness.

Mr. MALARKEY: Referring to this map, Mr. Brodie, marked exhibit 7: This point marked Mt. Tabor Junction is within the city of Portland, is it not?

A. Yes sir.

Q. And about how far is it along the line of the defendant street car company's southern line from Mt. Tabor Junction to the city boundary?

A. About one-half mile.

Q. You would not be accurate upon that?

A. It is a half mile between Hawthorne Ave. line and Section line.

Q. I will ask you if it is not a fact, Mr. Brodie, that from the city boundary line at the point where the car line of the defendant company from Portland to Lents crosses the city boundary line on out that car line to Lents, if it is not settled up pretty nearly like a solid city?

A. Yes sir.

Q. And there are settlements all along that line?

A. Yes sir, stores and dwellings.

137 Q. And they have stops every five or six hundred feet, do they not?

A. Yes sir.

Q. There has been a great deal of work done in that district by real estate agents in the last few years?

A. Yes sir.

Q. They have boomed that country pretty well, haven't they?

A. The country has boomed, I don't know whether it has been due to the real estate agents.

Q. You got in and got this company to give you five cent fares and they helped you out?

A. Yes sir.

Q. You know what Nickum is?

A. Yes sir.

Q. Is Nickum anything like Lents?

A. No, there is nothing there but a station. May be a few houses around it.

Q. Nothing much at Nickum?

A. There may be a few farm houses.

Q. No settlement such as around Lents?

A. Oh, no!

Q. Have you been to Oak Grove?

A. Yes sir, I have been to Oak Grove.

Q. Which is the larger, Oak Grove or Nickum?

A. Oak Grove.

Q. And how about Courtney?

A. There is more about Courtney than Nickum.

Q. And how about Risley? More people?

A. Not very many people right around Risley. Of course, farm houses——

Q. There are not many people right around Nickum?

A. No, I should say not.

Q. Are there not more people around Risley than Nickum?

A. I think there are more people near Risley than Nickum.

Q. And how about this place called Center—What would you say about Center?

A. I do not just remember Center.

Q. I will ask you, Mr. Brodie, (offering exhibit 7 for inspection) and referring to stations between Island and Concord, which
138 we enumerate—Milwaukee Heights, Courtney, Oak Grove, Center and Risley, and looking at Nickum station over here, I will ask you if it is not a fact that all of these stations have not more houses around them and are larger settlements than Nickum?

A. I should say so.

Q. I think that is all.

Re-examined by R. C. WRIGHT:

Q. Mr. Brodie, is there any competition between this road and other roads in passenger traffic at Lents?

A. Not between this road and other roads.

Q. I mean this road—defendant in this case?

A. No sir.

Q. Has it any competition in any way whatsoever in passenger traffic?

A. Not that I know of. There is no railroad competition.

Q. Is there any competition that you know of between this defendant in this case—Portland Railway Light and Power Company—for passenger traffic between Oak Grove and Portland?

A. Steamboat runs not very far away.

Q. Does it compete—ever see any one use it?

A. Not recently.

Q. They have since the railroad has been there?

A. Use it some but not to amount to much.

Q. They do use it some?

A. Not to amount to much.

Q. In your statement about Nickum, as a matter of fact to your own knowledge do you know anything about when the station was put in?

A. I only know it when I see it. I was through there a few weeks ago and saw the sign.

Q. Do you know anything about the station?

A. No sir.

Mr. AITCHISON: What was the first fare to Lents—five cents?

A. As a general fare five cents to subscribers of that original road.

Q. And to others, ten cents?

A. Yes sir.

Q. And that brought you how far?

A. Clear into town.

Mr. WRIGHT: One other question I will ask: You were asked if the country were not settled clear out to Lents. Your answer
139 was that it was settled up. State whether or not that was due to the five cent fare that the people settled there?

Mr. MALARKEY: I object to that. That is a conclusion witness

might draw but he don't know. I might think that I knew that to be a fact and not be a fact. I object to the question.

Mr. AITCHISON: He can tell what he knows of his own personal knowledge.

A. That was one of the factors—I don't know that it was the only cause.

Mr. MALARKEY: You do not undertake to say that if Oak Grove had a five cent fare it would be as large a place?

A. No, I don't know.

Q. It might become a good deal larger?

A. Yes sir, it might.

Q. It might become a larger place without a five cent fare?

Mr. WRIGHT: You don't think it is probable that Oak Grove would go away ahead the way Lents has?

Mr. AITCHISON: Ruled out.

Mr. WRIGHT: Call Mr. Johnson.

Mr. MALARKEY: I would like to ask the commission about what time they intended to adjourn? I would rather that you would not work right up to five o'clock. You are going to be here until Thursday afternoon, are you not? I wanted to ask if the commission could adjourn before five o'clock. It would be a convenience to me if they could.

Mr. WRIGHT: We have two witnesses here from Lents. Their evidence is not exactly cumulative.

Mr. MALARKEY: What do you expect to prove by Mr. Johnson? I will admit he will testify the same as Mr. Brodie.

J. J. JOHNSON, a witness produced on behalf of the plain-
140 tiff after being duly examined and sworn testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Johnson?

A. Tremont Place.

Q. Have you lived in that vicinity for any length of time?

A. I have lived in that immediate place for a little over two years. I was born at Mount Scott.

Q. You have been in that community nearly all your life?

A. Our farm place is about, a little over half a mile southeast.

Q. Are you familiar with the growth of the territory in and about Lents station?

A. Yes sir.

Q. State to the commission what has been the growth of that country—of the town of Lents since 1901 up to the present time?

A. Well, you mean with reference to the time this company took charge of the road? I can give it the best I know how. April 30, 1901, this road was already there in a way. The same car line transferred to Mount Tabor Junction. Very soon after the 1st of January they shut down and did not run until July 1901, about that time. I happened to be out there at that time—over at the farm—the first of February that was. I had to be away from home on account of circumstances from home and of course the

territory in my mind had greatly dwindled. I cannot recall named to be very definite. There was no growth at all. The prior company to this company and this company put on fairly good service but of course did not improve so rapidly for some time. I think that was due to the impulse of the people. Until——

Q. (Interrupting.) Do you remember the date a five cent fare was made out to Lents?

A. When the road was first originated, some fifteen or twenty years ago, they had some such arrangement.

Q. I mean the present company or its predecessors?

Mr. MALARKEY: They made it right from the time they took hold of it.

Q. I am asking you about the development of the country at the time?

141 A. Of course, you all appreciate the fact that there had been very dull times and times were very bad. I suppose that hurt a great deal. And, of course, the road being taken off hurt a good deal. Later, whether you subscribed or not, a five cent fare was given to everybody, and it seems the real estate men came in there then and of course began to boom that country and, of course, the main thing held out was five cent fare. I do not remember names but a great many persons were there. I would not live out there now unless it were for the five cent fare because you can get a place near for five cent fare. It was advertised on account of five cent fare. Real estate agents advertised it as being five cent fare and I think even on some of their posters was put on as one of the inducements on account of cheap lots. The fact that this—of course prior to that time it was a district, you might say, of brush all the way from Lents station clear to town excepting one or two points. After that it was cleared off and it surprised all of us. Just seemed houses went up in every direction. There were some few houses between Portland and Lents Junction. Then they put up store after store all the way out that line. It looks almost like a city.

Q. Look at these exhibits of real estate——

Mr. MALARKEY: You are not going to——

Mr. WRIGHT: He has just referred to posters. I want to ask him if this is the kind of posters.

Mr. AITCHISON: That general statement has gone in It is hardly necessary to introduce cumulative evidence.

A. Of course I could not definitely state.

Q. Have you seen advertisements of Arleta Park No. 2 district out there?

A. There has been all sorts of advertisements.

Q. The real estate men advertise as an important factor that there was a five cent fare out there?

A. Yes sir.

Mr. AITCHISON: I don't think we need go into it farther.

Cross-examined by DAN J. MALARKEY:

Q. Do you know where Nickum is?
142 A. You mean that place on the Mount Scott line?
Q. Yes sir.
A. I know it is on the Mount Scott line.
Q. There is no such development as on the Lents line, is there?
A. No sir. All I could see is a hill above the line—there is a cut there and you have to go up a stairway. I would not buy there.
Mr. AITCHISON: On account of the dissimilarity of the country? Do you think the country around Lents is better than it is around Nickum?
A. The soil around Nickum is not as good as around Lents. Oak Grove soil is good.
Q. How about the value of the land as acreage around Nickum as compared with the land around Oak Grove?
A. I don't know very much about the producing value of the land but I would say Oak Grove is the most valuable. But, as to the value of the land I could not testify.
Mr. WRIGHT: Is the character of the surface of the country around Nickum entirely different than around Lents?
A. The surface that I was over I would say that I think the character of the soil and the surface hilly. The road goes through a very deep cut and there is a very long step ladder goes up to the top of the bank. As to how many houses up there I do not know.

Mr. WRIGHT: Is it dissimilar on similar—Wright's letter 11/27/07 --to railroad being run through Sullivan's Gulch?
A. Something like that; may be more hilly than that.

A. W. MILLER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Have you lived in and about Lents station?
A. I live this side of Lents about a mile—Tremont.
143 Q. How long have you lived there?
A. Since 1898.
Q. Were you at one time census taker for the United States Government?
A. I was census taker for the United States Government in 1900.
Q. Did you take the census of the Lents district?
A. Yes sir.
Q. Did you make the count?
A. Yes sir. Two districts in fact, Lents district and Woodstock district consolidated.
Q. What was the count you made of the inhabitants of the Lents district?
A. Lents district I haven't got separate. All in one.
Q. What territory did it embrace?

A. City boundary east six miles; from Powell Valley south to Clackamas County line, six miles square.

Q. Did it include all territory in and about Lents?

A. Yes sir.

Q. You will state the total population you made?

Mr. MALARKEY: I object to that as being incompetent, immaterial and irrelevant—six miles square.

Mr. WRIGHT: This will show the total population.

Mr. MALARKEY: What do you claim for this?

Mr. WRIGHT: Showing the population of Lents.

Mr. MALARKEY: It may include Lents.

Mr. AITCHISON: Go on and answer the question.

Q. What was the total number in that district?

A. 935 souls.

Q. And how many in and about Lents?

A. I do not know.

Q. Have you lived out near there since the year 1900?

A. Yes sir; oh, yes sir.

Q. Did you serve the Government as census taker for some little time?

A. They gave me, because my territory was the largest, two weeks longer than the others.

Q. Did you serve the Government continuously since that time?

144 A. As census taker? No sir.

Q. Having had the experience taking the census there, can you state in your opinion what the present population is of the district or community immediately in and about the station?

Mr. MALARKEY: I object to that. It is not subject to division and, in the second place there is no separation in the district.

Mr. WRIGHT: I will withdraw that question.

Q. From your experience as census taker can you state to the commission what is the probable population of a district one-half mile each side of Lents station along the railroad?

Mr. AITCHISON: He just said he could not give an estimate.

A. I could not make a division.

Mr. WRIGHT: I will withdraw that question.

Q. Do you know how many families living in and about Lents at the time you took the census?

Mr. AITCHISON: Within the district you mentioned?

Q. I am taking a district about one-half mile each side of the station of Lents.

A. At that time? I might make a rough estimate, perhaps one hundred families. I understood you took Lents as a center and radius of one mile?

Q. One half a mile?

A. Be less, perhaps fifty, or seventy five families.

Mr. AITCHISON: What is your judgment as to how many families are now in that territory?

Mr. MALARKEY: That is what we objected to. It is not a matter of information upon which testimony can be received.

Mr. WRIGHT: He has been a census taker, therefore has had some experience counting. Now, if you want to quit at this time I will not object.

Mr. AITCHISON: The exhibits 2½, 3, 4, 5 and 6 are offered in evidence by plaintiff and objected to by the defendant.

Mr. MALARKEY: They are incompetent, irrelevant and im-
145 material and are hearsay testimony. We have had no opportunity to examine anybody making these statements.

Mr. AITCHISON: Objection sustained. Excepted by plaintiff.

At the hour of 4:45 p. m. October 28, 1907, adjournment was taken until 9:30 a. m. October 29th, 1907, at the same place.

Pursuant to adjournment commission met at the hour of 9:30 a. m. October 29th, 1907, present the same as yesterday.

B. LEE PAGET, a witness produced on behalf of plaintiff, after being duly examined and sworn, testified as follows:

Examined by R. C. WRIGHT:

Q. Where do you live, Mr. Paget?
A. Oak Grove, Clackamas County, Oregon.
Q. How long have you lived there?
A. A little over a year.
Q. Are you the president of this Oak Grove Improvement Association, the plaintiff in this case?
A. Yes sir.

Mr. WRIGHT: Now, I would say to counsel for defendant that I wish to avoid the necessity of calling a witness here on that Lents question to establish the fact that they have telephone and light service. In the haste of yesterday I overlooked that. I think Mr. Fuller knows they have those. Are you willing to concede that to be a fact? We will stipulate then by agreement that the testimony of Mr. Additon, who was on the stand yesterday, if called today would testify to the effect that there is a telephone and electric light service in the stores and private houses in a district half a mile in circumference around Lents depot.

Mr. AITCHISON: One half mile in circumference?

Mr. WRIGHT: One half mile each way.

Mr. AITCHISON: That would be ¼ of a mile each way. You mean radius?

Mr. WRIGHT: Yes sir. Within a radius of one half mile.
146 Such testimony is offered at this time. You agree that such testimony would be given and make no objection to it?

Mr. MALARKEY: Why, yes sir. I would stipulate a great many more things. I will stipulate that Lents is larger and more prosperous than Oak Grove in every respect. What more do you want?

Mr. WRIGHT: Mr. Paget obtained some data from the directory people as to the population out there and if you will allow him to offer the testimony as to the present population——

Mr. MALARKEY: Of what?

Mr. WRIGHT: I think he has the statistics there.

Mr. MALARKEY: Let me see it.

Mr. WRIGHT: He has just a little memorandum there. Have you the districts down there?

Mr. MALARKEY: If you want to stipulate that Mrs. Clinton would testify that the facts are as stated on that card——

Mr. WRIGHT: Mr. Paget obtained them and he will have to state what they are.

Mr. MALARKEY: Do they show there? Did you get the information from the directory here? You do not know of your own knowledge that there are that number of people in that district?

WITNESS: I know it just as much as if I looked into the city directory.

Mr. MALARKEY: No, you—you might know that I might live in some residence——

WITNESS: I may know it by reference to the directory.

Mr. MALARKEY: Well, I object to his statement as to what Mrs. Clinton said then.

Mr. WRIGHT: We will have to call her then.

Mr. MALARKEY: Call her then.

Mr. WRIGHT: I am unable to state exactly what she said to get it down on the record.

Mr. MALARKEY: There are the facts. It is all nonsense.

Mr. WRIGHT: I have not looked at the card.

Mr. MALARKEY: Look at it then.

Mr. WRIGHT: I cannot make it out from this.

Mr. MALARKEY: I can.

147 Mr. WRIGHT: That is all right, but——

Mr. MALARKEY: I objected to this course you have pursued——

Mr. WRIGHT: Just withdraw all that about stipulating with regard to the directory. I want a direct agreement as to what Mrs. Clinton's testimony will be and that card is not definite enough. That is the point I am making. You want me to go into something indefinite.

Mr. MALARKEY: I do not think any of it is relevant. It is silly.

Mr. AITCHISON: Let us go on, gentlemen.

Mr. WRIGHT: Mr. Paget, have you ever travelled over the lines of the defendant company from Lents to St. Johns?

A. Yes sir.

Q. State, if you know, what fare is demanded and collected by the defendant company for the transportation of passengers from Lents to St. Johns, Portland Heights, Milwaukee Heights, Thurman St., Terminal Yards, Mt. Tabor, Albina Ave., Montavilla, Irvington, Russell St., Fulton, Hamilton Ave., Jefferson St., Loncoln St., Montgomery, St., Northrup Street?

Mr. MALARKEY: We object to that as being incompetent, immaterial and irrelevant, and because it is not shown that these are the lines of the Portland Railway Light and Power Company. As a matter of fact these lines are the lines of the Portland Railway Company and it is a seperate corporation entirely. Just because counsel says——

Mr. AITCHISON: Let it go in subject to the objection.

Mr. MALARKEY: I would like to ask Mr. Paget again at this time bearing upon this question——

Mr. WRIGHT: I am examining this witness. Suppose I have a little opportunity to do that myself.

Mr. AITCHISON: Do you want to develop his competency on this objection? We will sustain the objection until you delevop competency.

Mr. WRIGHT: When passengers take the cars of the defendant at Lents to go to the places I have just mentioned to you, does the defendant company sell them transportation to those places from Lents?

A. Yes sir.

148 Mr. WRIGHT: Now then, do you want to ask witness a question?

Mr. MALARKEY: I understood that objection to the other question was sustained. You say you know this of your own knowledge.

A. Yes sir.

Mr. MALARKEY: Did you ride from Lents to the terminal of the company's line on Portland Heights?

A. Yes sir.

Mr. M.: How long ago did you make that trip?

A. Any time within the last twelve months.

Mr. M.: What time within the last twelve months?

A. Not more than once.

Mr. M.: You are testifying to your own knowledge?

A. Yes sir.

Mr. M.: You will swear now that you have ridden from Lents within the last twelve months from Lents to the terminal at Portland Heights; that is true, is it?

A. Well now, Mr. Malarkey, I think perhaps I will modify that. I think I will modify that.

Mr. M.: This is where we want facts, Mr. Paget, of your own knowledge.

A. No, I don't think I have. Not within that period to that part of the line.

Mr. WRIGHT: Mr. Malarkey——

Mr. MALARKEY: Just a minute, I am doing this examining. Have you ridden on the lines of the Portland Railway Light and Power Company from Lents to Willamette Heights?

A. I have ridden, Mr. Malarkey, from Lents to certain of those points mentioned there in that complaint. I have never had any difficulty in getting my transfer to any of those points I have ever asked for. I think I am fair in assuming in taking for granted, that the company is issuing transfers according to regular——

Mr. MALARKEY: We do not want assumption—we want facts. This is a judicial proceeding and we want your own knowledge. To what termini of the places enumerated by Mr. Wright—to what points have you ridden from Lents by use of a transfer given to you when you get to First & Alder streets?

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A. St. Johns, Russell St., Albina Ave. Those are the only ones I have recollection of riding the entire distance from Lents.

Mr. M.: Did you make these rides by riding the entire distances for the purpose of making a witness in this case?

A. No sir.

Mr. MALARKEY: Then for instance as to testifying you were mistaken you did not testify to your own knowledge?

Mr. AITCHISON: The objection to that question was sustained and the answer was not made.

Mr. MALARKEY: You sustained the objection to the question witness had ridden over the lines of the defendant company. Then Mr. Wright asked this question: Whether or not witness had ridden from Lents by transportation given to you by the defendant company from Lents.

Mr. AITCHISON: The question was whether defendant company sold such transportation.

Mr. WRIGHT: That was the question.

WITNESS: I would like to add to my ansyer to that question. The fact that from time to time the company has issued little booklets giving the details as to their transfer system and some of these points are covered in that transfer booklet.

Mr. AITCHISON: If there is no question about that fact can you not develop the fact.

Mr. MALARKEY: Object to this—in witnesses testifying to something they do not know of their own knowledge. I object to a man testifying to what he does not know and the commission has no right to consider anything except competent evidence.

Mr. WRIGHT: He has testified that he has ridden from Lents to St. Johns and one or two other places here anyhow.

Mr. AITCHISON: Proceed, Mr. Wright.

Q. Have you ridden between St. Johns and Lents at any time?

150

A. Yes sir.

Q. What fare was charged to you and collected for the entire distance?

A. Five cents.

Q. Have you measured on the maps or obtained any information that you can testify to regarding the distance of St. Johns from Portland? If you have, state what the distance is.

A. I tried to ascertain the distance from St. Johns to Portland but was unable to obtain the information when I enquired at the company's offices. I enquired from one or two conductors as to what their ideas were as to the distance and I was told it is about nine and one-third miles.

Wright's letter 11-27-'07.

Q. Did you make any measurements?

A. No sir.

Q. Are you sure you did not measure that off on a map at any time?

A. I think I made some comparison on one of the company's maps. Just a rough approximate, comparing that distance according to scale on another line.

Q. Simply an approximate measurement?

A. Yes sir.

Q. Did you ever measure it up with a real estate map like that one hanging on the wall?

A. Yes sir.

Q. Was that real estate map you say you measured it on drawn to a scale?

A. Yes sir.

Q. Did you follow that scale in making your measurements?

A. Yes sir.

Q. Now then, you may state whether you have ever ridden from Golf Links to St. Johns?

A. Yes sir, I have ridden with St. Johns transfer but I have not ridden to the end of the line—I have not ridden actually to St. Johns.

Q. What kind of a transfer did you get?

A. The transfer I received entitled me to ride to St. Johns.

Q. From the Golf Links to St. Johns?

A. Yes sir.

Q. What was the fare charged and collected of you by this defendant company for transportation from Golf Links to St. Johns?

151 Mr. MALARKEY: We object to that as being incompetent, immaterial and irrelevant. It is admitted that Golf Links is within the city. The lines to St. Johns are all within the city.

Mr. WRIGHT: We do not admit that St. Johns is in the city.

Mr. MALARKEY: You do not admit that the St. Johns lines are in a city?

Mr. WRIGHT: All in a city—Portland and St. Johns.

Mr. MALARKEY: Certainly I admit that, and their boundaries come right together. That being the case what does that have to do with this case?

Mr. AITCHISON: Let it go in subject to the objection and we will consider it later.

Mr. WRIGHT: We want it in the records so that we can have something to argue on.

WITNESS (answer): Five cents.

Q. Have you ever ridden from Golf Links to the Union Depot, Terminal Yards, Mount Tabor or any of these other terminal places I mentioned a few moments ago?

A. Yes sir.

Q. What was the fare charged at those times?

Mr. MALARKEY: I will make the same objection because these places referred to are all within the city.

Mr. WRIGHT: You are right; I will withdraw that question.

Mr. WRIGHT: Have you ever ridden from Oak Grove, Center, Courtney or Milwaukee Heights to St. Johns or any of these other places I mentioned a few moments ago?

A. Yes sir.

Q. When you rode over the lines of the defendant state what fare you paid to reach these places?

Mr. MALARKEY: I object to this question. These places are all outside of the city. The way you framed your question you asked whether he had ridden from these various places to St. Johns. He says: "Yes sir." Now which one it is we do not know. In other words——

Mr. WRIGHT: We will withdraw the question to save time.

Q. Have you ridden from Center to St. Johns or any other of these other places?

152 A. Yes sir.

Q. Have you ridden from Oak Grove to other places?

A. Not from Oak Grove as a starting point. I have ridden from Oak Grove going through it.

Q. Where did you start from?

A. I started from Center. My home station is Center I go through them——

Q. You say you go through them. Do you refer to Oak Grove, Milwaukee Heights——

A. Yes sir.

Q. Now, when you go from Oak Grove passing through what fare did the defendant company charge you and collect from you to reach these places?

A. In answering that question I am going to answer it first of all: The fare I paid originally until I got onto some certain kinks, which by experience I learned about, as an uninitiated patron of the line without any advices and without being told, I paid twenty cents in riding those distances.

Q. State the parts of that fare collected of you. Was it all collected at once, or in portions. Explain how you paid?

A. I paid the fare in portions.

Q. Go on and explain how you paid the fare?

A. The fare from Oak Grove to First & Alder Streets is fifteen cents and no transfer is allowed on that fare at all so that for the change distances you have to pay another five cents.

Mr. WRIGHT: Are those simply fares you have paid, or do they have to be paid by others who travel over the defendant's lines to these other places mentioned a moment ago?

A. Yes sir, on a one fare basis.

Q. And coming through from those places to Center, what fares are charged?

A. The same each way.

Q. Does one fare paid include a transfer?

A. If you happen to have gotton onto the fact that by purchasing a ticket for part of the way and at that point paying again you

153 are able to get a transfer but it is only those who are experienced that the benefit is obtained.

Q. Did you receive this letter from the defendant company? (Exhibits letter.)

A. Yes sir.

Q. I suppose it will be admitted that is Mr. Fuller's signature?

Mr. MALARKEY: I do not know whether it is or not; let me see it.

Mr. WRIGHT: I would say to counsel that I am not offering that for any of the contents of the letter—we merely offer this letter head to show the names of these companies and not for the matter contained in the letter.

Mr. AITCHISON: We had better read it into the record.

Mr. WRIGHT: The plaintiff offers exhibit 8, a letter head of the defendant company for the purpose of showing the name of the defendant company at the top thereof in large type "Portland Railway Light & Power Company" and below it the names of the following corporations: "Portland Railway Company," "Oregon Water Power & Railway Company", "Portland General Electric Company", "Vancouver Electric Light & Power Company". The plaintiff also offers all testimony in regard to fares from any points to St. Johns for the purpose of showing that the defendant sells transportation to the public from those points to St. Johns, and also for the purpose of comparing charges made between St. Johns, a point without the city of Portland, and points within the city of Portland.

Mr. MALARKEY: Let me understand with reference to this letter. As I understand it, the whole letter is received. A person cannot introduce a part of a document, it must be all or none.

Mr. WRIGHT: I submit it only for the letter head.

Mr. MALARKEY: That may have been the particular motive you had in introducing the letter, but as I understand it——

Mr. WRIGHT: I will take leave to substitute a blank letter head.

Mr. MALARKEY: We would object to that. I would like to have an understanding. What we object to is that we want to understand the whole thing. You cannot introduce a document and have a part considered and——

Mr. WRIGHT: Exhibit 8 is offered by the plaintiff with
154 leave, by courtesy of the commission to substitute a sheet of the same character without the written matter.

Mr. M.: The only thing written in it which is competent is Mr. Fuller's signature. If you want to introduce the letter you are perfectly at liberty to do so.

Mr. WRIGHT: I simply wish to show the names of these companies——

Mr. AITCHISON: The object of the letter is to show there is common management for all these corporations?

Mr. WRIGHT: As far as that is concerned——

Mr. AITCHISON: The whole letter ought to go in. Let the whole letter go in.

Mr. WRIGHT: Mr. Paget, you signed the complaint in this case, did you not?

A. Yes sir, I did.

Q. When you were making up the list of these fares enumerated

in the complaint to various places, as for example, Lambert, where the fare paid is more than five cents, for example, fifteen and twenty cents, there is a difference between that list and the one offered by defendant, is there not?

A. Yes sir.

Q. Will you please explain that difference?

A. I have copied these figures from the company's printed schedules but there is a difference of five cents which was explained probably in my answer to a former question. There is a way in which you may get a corresponding reduction of five cents.

Q. I am speaking now of these rates to other points that are not on the line where Golf Links is; where there is, for example, fifteen cents in their list to Sycamore station, does that include the price of a transfer to the city? There is a difference of five cents in your complaint and the answer?

A. Yes sir. Both amounts include the price of a transfer, providing fare is paid as I explained awhile ago—pay to transfer point and from there on.

Q. Does that explain the differences in these figures in the two documents in the case?

A. Yes sir.

Q. Are you a school director in the Oak Grove district?

A. Yes sir.

155 Q. Do you know what the present school attendance is in that district?

A. Yes sir.

Q. Will you please state what it is?

A. The present school attendance in that district is seventy.

Q. Do you know what the attendance had been in that district in past years?

A. I know what the school census has been.

Q. Can you state that census?

A. Yes sir.

Q. Then please do so.

A. In the year 1903, there were 65; in 1904, 65; in 1905, 80; in 1906, 93; in 1907, there were 98.

Q. How many teachers does the district employ?

A. We employ two teachers in that district.

Q. How many have been employed in past years in that district?

A. Two teachers.

Q. In those years you have referred to——

Mr. MALARKEY: He has only lived in that district one year.

WITNESS: I could answer from the records.

Mr. AITCHISON: I think if he is an officer of the school district and has access to the records he is qualified to testify to them.

Mr. WRIGHT: He is a school director now.

Q. Have you any electric lights in Oak Grove or Center?

A. In the residences, you mean?

Q. Yes sir.

A. No sir.

Q. Have you any electric lights in the residences at Courtney?
A. No sir.
Q. Is there any telephone service there to stores or private houses?
A. No sir. There is just one public telephone connection made with the principal store to the long distance line going through to Oregon City.
Q. Did you take up with the electric light company the matter of obtaining electric lights for Oak Grove?
156 A. Yes, sir, very vigorously.
Q. Please examine those letters there and state whether or not those are the letters you received from the representatives of that company?
A. Yes sir, those are some of the letters.
Q. One of these letters is a copy—is the original letter here? If there is any objection to the copy we will simply introduce the other letter—this being a carbon copy of Mr. Paget's letter to the company. If you object to his copy we will simply introduce the other.

Mr. MALARKEY: We object to all of these letters as being hearsay testimony. They are incompetent, immaterial and irrelevant.
Mr. WRIGHT: You will admit the signature of the gentleman on the bottom, will you not?
Mr. MALARKEY: No sir. We will admit it, that is to say, if the letters are relevant.
Mr. WRIGHT: You do not mean to say——
Mr. MALARKEY: If it is a matter of fact to put witnesses on the stand here and they testify to what somebody else said to them——
Mr. WRIGHT: This is a statement made by this same company——
Mr. AITCHISON: Objection overruled.
Mr. MALARKEY: Defendant is not the General Electric Company.
Mr. WRIGHT: It is on the letter head of the Portland General Electric Company.
Mr. WRIGHT: We offer that for the purpose of showing the efforts made by the plaintiff association to obtain electric lights in that vicinity.
Mr. AITCHISON: Well, if they are offered for that purpose the objection will have to be sustained.
Mr. WRIGHT: It is offered in both ways—offered for all purposes. We are simply calling attention to this one name on the letter head.
Mr. AITCHISON: Let the letter go in.
Mr. MALARKEY: There is no use to take exceptions.
Mr. WRIGHT: Mr. Paget, did you have any conversation
157 with the defendant company with regard to these lights?
A. We had very considerable correspondence with the representative of the electric light company.
Q. Did you have any conversations with the representatives of the electric light company?
A. On one or two occasions they sent men out to the meeting of our improvement association, and at another time they sent a man or men out there to canvass the territory and solicit names for subscriptions to ascertain possible business out there.

Q. Was this matter of electric lights taken up by your association or by you personally?

A. The matter of electric lights was taken up with the company both by the association and by me personally. Also the matter of motive power was taken up in connection with it.

Q. Mr. Paget, you may state what you know about the visits received by people who reside in Oak Grove, Center and Courtney from friends who live in the city, whether frequent or otherwise?

A. It is an expensive luxury, very.

Q. What is the reason they do not go out very frequently?

Mr. MALARKEY: I think I will object to that.

Mr. AITCHISON: Let him answer if he knows.

Mr. MALARKEY: It will be pretty hard for Mr. Paget to testify to what people of common sense know he does not know.

Mr. AITCHISON: It is a matter of general notoriety. Answer if you know, Mr. Paget.

A. I know my friends claim they cannot afford to come out but that they would like to; they cannot afford to from the fact it is such a costly trip. For instance, if a family of four people want to make the trip out and return they would have to spend a dollar or two.

Mr. MALARKEY: It would be just so much more if you lived at Oregon City.

158 Q. What is the expense of your family for fares over this line between where you live and Portland.

A. Street car fares between my home and Portland for my family cost me $20.00 monthly. I am paying tribute to the company for car fare $20.00 per month.

Q. State to what extent the population of Oak Grove, Center and Courtney do business in Portland daily?

A. What percentage?

Q. Yes sir.

A. A large proportion of them do.

Q. What proportion would you say?

A. I do not think I would attempt to make any specific estimate, Mr. Wright.

Q. Is there much business done in these three places I mentioned?

A. No sir. The extent of the business is only small, one small grocery store. There are two, one of which is very small though.

Q. These places I have just mentioned, are they all stopping places for the cars?

A. Yes sir.

Q. Is there a local newspaper published at any of these places?

A. No sir.

Q. Is there any competition by any other transportation line for this travel of persons between Oak Grove, Center and Courtney and the city of Portland.

A. No sir. Not even the devil wagons we heard of yesterday.

Q. Do you know whether there has been any complaint in regard

to the high fares causing families to leave there, and, if so, state what you know?

Mr. MALARKEY: We will object to that for the same reason we have objected to other questions—that it calls for hearsay testimony.

Mr. WRIGHT: I will withdraw that question and frame it *it* another way.

Q. Do you know whether any families have left Oak Grove, Center or Courtney because of any complaint as to the fares charged between Portland and those places?

A. I know of a person or two and have heard of several others who left for that reason.

Q. How long did you live there?

A. A little over a year.

159 Q. Have you noticed any increase in the population during that time?

A. No sir, I have not noticed any material increase during that time.

Q. Have you ever been in St. Johns to any extent?

A. Yes sir, quite considerable.

Q. Do you know anything about the increase in population there?

A. Yes sir.

Q. Has the increase at St. Johns been large or small?

A. The increase has been very large at St. Johns.

Q. Do you know anything about the increase of houses and business places there? If so state what the increase has been.

A. The increase has been so great as to be the talk of the city and county, and state almost.

Q. A great deal was said about Nickum here yesterday. Do you know anything about that place?

A. Yes sir, a little.

Q. Will you please state what you know about it?

A. One thing I know about it is that it is a point considerably beyond the city limits and the company granted them a five cent car fare. Another thing I know is that the line goes through a deep cut there, and if I am correctly informed, it was very expensive to build.

Mr. AITCHISON: May I ask a question, Mr. Wright? This cut at Nickum goes through a sort of precipitous hill, does it not?

A. Yes sir.

Q. And you climb up a stairway and the hill slopes off in all directions, does it not?

A. I have never been up there, I just saw it from the car line.

Mr. WRIGHT: Mr. Paget, you may state in a general way in regard to the growth of Oak Grove, Center and Courtney, or the country immediately tributary to those stations as to passenger traffic.

Mr. AITCHISON: During what time, Mr. Wright?

Mr. MALARKEY: Do you know anything about that of your own knowledge?

160 A. No sir, I do not.

Mr. MALARKEY: Counsel should not have asked that question.
Mr. WRIGHT: I withdraw that question.

Q. Speaking of that Nickum question: Do you know anything in regard to the service out there?
A. Yes sir.
Q. What is the service there?
A. The first car coming in from there to Portland in the morning reaches Portland four minutes past 9:00 and there are six more cars run over the line from there during the day and night at more or less irregular intervals and not less than about two hours at any one interval.
Q. What is the present service as to time from Oak Grove, Center and Courtney?
A. They have twenty-five minute service except late in the evening. All day long they have 25 minute service.

Cross-examined by Mr. MALARKEY:

Q. Mr. Paget, you live at Center, do you not?
A. Yes sir.
Q. You have lived there a year, have you?
A. Yes sir.
Q. Center is on the Oregon City division of the defendant railway company, is it not?
A. Yes sir.
Q. It is between Portland and Oregon City, isn't it?
A. Yes sir.
Q. The other points referred to—Courtney, Oak Grove and Risley are also on that division, are they not?

Mr. WRIGHT: I did not refer to Risley.
Mr. MALARKEY: Did you not?
Mr. WRIGHT: No sir.

Mr. MALARKEY: The car service you have along there is the same car service they have in Oregon City, is it not?
A. Yes sir.
Q. That is to say, every car passing going south passes those stations going to Oregon City, do they not?
A. Yes sir.
Q. And every car going north to Portland passes through those stations, do they not?
161 A. Yes sir, with occasional exceptions. I understand some of the cars originate at Gladstone. I do not know but I understand so.
Q. What I want to get into the records is this fact: That you have no special service on the line up to those points For instance such as that to Milwaukee, where they have a car that goes to Milwaukee and back?
A. Same as Laurelwood.
Q. Now, Milwaukee Heights is how far from Portland? Are you familiar with the distances?
A. The distance is 8.69 miles.

Q. That is the distance from Milwaukee Heights to Portland, is it?

A. Yes sir.

Q. And how far is it from Courtney to Portland?

A. I will have to look that up. However, the mileage is stated in the complaint and answer.

Mr. WRIGHT: I checked them up and there were no differences.

Mr. MALARKEY: Then I understand you admit the mileage as stated in this answer are correct, do you?

Mr. AITCHISON: Are they the same as they are in the tariffs?

Mr. MALARKEY: Yes sir.

Mr. MALARKEY: This company did not ask you to move out there, did they?

A. No sir.

Q. What was the fare then, was it the same as it is now?

A. Yes sir.

Q. You knew w-at the fare was, why do you say the company was levying tribute?

A. I did not say "levying"; I said I was paying tribute.

Q. What do you mean by that? You know as a matter of fact if Oregon City had a five cent fare they would like it?

A. Yes sir, Oregon City would like a five cent fare to Portland.

Q. Do you not think that if Center got a five cent fare that the people at Risley would complain?

A. I have nothing to do with that.

162 Q. Would not the people at Concord, which is less than a mile beyond, also complain?

A. I have no interests at Concord.

Q. Have you any interests in Lents?

A. No sir.

Q. Have you any interests in St. Johns?

A. No sir.

Q. You are simply interested in getting reduced fares from Center?

A. Yes sir. I am interested, Mr. Malarkey, that myself and my neighbors get from the company the same fares and the same consideration that people in other places similarly situated get.

Q. Do you not think, applying the same principles and applying the Golden Rule, do you not think that your neighbors at Concord, Risley and at Naef should get the same as you are asking for?

A. All that we are asking for is the application of the Golden Rule.

Q. You are here asking for five cent fares?

A. Yes sir.

Mr. AITCHISON: I thought you were asking for ten cent fares?

A. We are asking for five cent fares.

Mr. MALARKEY: Do you really think, Mr. Paget, that you ought to have five cent fares?

A. Yes sir.

Q. The distance to Oak Grove is 8.48 miles, and do you not

think if you got a five cent fare to that point that the people at Risley would think that they ought to have a five cent fare also?

A. I think we said so in the complaint.

Q. Then you are asking for a five cent fare to Risley, 9.26 miles, are you?

Mr. WRIGHT: You are mistaken, Mr. Paget.

Mr. PAGET: All right, it is my mistake. Mr. Malarkey, let me say in answer to your question that, considering the fare granted to our friends at Lents there would be nothing unreasonable in the conclusion.

Mr. AITCHISON: Do you make a claim that the rate charged you is of itself at the present time unreasonable?

A. Yes sir.

Q. Or only by comparison?

A. Yes sir; I think this whole case——

163 Mr. MALARKEY (interrupting): Shows that the claim of the plaintiff in this case is that the rate is unjustly discriminatory when compared with other places?

A. Yes sir.

Q. You do not undertake to claim that the fare for over eight miles is unreasonable?

A. That is not in the case.

Q. You do not claim here in this case that the charge of 15¢ to these places to Portland is in itself, in comparison with other fares which you have cited, to Lents or St. Johns, is excessive or unreasonable; do you?

A. Yes sir, that is right.

Q. You do make that claim, do you?

A. Yes sir; we do.

Q. You claim that 15¢ for carrying people eight miles is unreasonable and an excessive charge, do you?

A. It would be simply an expression of opinion anyway.

Q. Well, I know that, but what we want to discover is, what is the basis of the complaint?

A. I have stated distinctly, Mr. Malarkey, the complaint is that the basis of rates is extremely discriminatory.

Q. And nothing else? That is what we want to know. In other words, suppose, Mr. Paget, suppose there was no Lents and no St. Johns?

A. As an abstract proposition I would not think it an extremely high rate.

Q. If there were no Lents or St. Johns the rates you complain of would not be, in your opinion, unreasonable nor excessive, would they?

A. I do not know about that. A line between a suburban point to the center of the city is a different thing from a line going to country points.

Mr. AITCHISON: The statutes under which this complaint is based provide that on complaint, and so on, that any of the rates, fares, and so on, are unreasonable and excessive or unjustly discriminatory.

Mr. PAGET: Yes sir, I see.

Q. Now, what we are trying to discover is whether you are being unjustly discriminated against or that the fact that the fare itself is unreasonable.

164 Mr. PAGET: I see the point. I think our complaint as filed is based upon the second charge there.

Q. That it is unjustly discriminatory?

A. Yes sir.

Mr. MALARKEY: Would you expect us then, regardless of there being any discrimination—suppose there were no Lents line?

A. That is taking up an imaginary situation.

Q. We were attempting to ascertain what was a reasonable rate.

Mr. WRIGHT: If you were attempting to ascertain what was a reasonable rate it seems to me you would look to see what this company were doing under similar conditions.

Mr. MALARKEY: And the burden would be upon the plaintiff to maintain the charge. Then, in view of the statements made by Mr. Paget that this complaint here is based upon the charge only that the rates are unjustly discriminatory——

Mr. WRIGHT (interrupting): I wish to say that our position upon this complaint is that we also, as compared for example with another institution—you may call it separate—where there is five cents charged for a distance of 9.37 miles. Now then, if another company, say this is a separate corporation, *d*an do that this company can certainly undertake to do suburban business if it is the only line running out to Oak Grove for the same rate they will transfer people for from St. Johns. What we want is a basis of comparison to make our proof to base it upon.

Mr. MALARKEY: I think this thing should be settled here and now by the commission. I do not think anybody can read that complaint and consider it as anything but a complaint. The gist of the complaint is that the rates charged by defendant to these complaining points—Oak Grove, Center and Courtney are unjustly discriminatory, though it is true the word "unreasonable" is used there. Suppose a person comes in here and presents a complaint to say that a rate is unreasonable, then he must offer some evidence in proof of it. Now then the question of the reasonableness or unreasonableness we are not prepared to try and have not considered it

165 at any stage. We did not consider that anybody would complain irrespective of comparison.

Mr. AITCHISON: The principle is certainly broad enough to cover all of it. Complain-t alleges in Paragraph 6 that the rates, fares and so on should be no greater than five cents for one trip and then he goes on and says so much higher fares are charged than for equal and greater distances.

Mr. MALARKEY: As I understand, it was that they undertake to say that the fare was unjustly discriminatory. I think the statement of Mr. Paget shows clearly that there was not anything else in their mind at the time.

Mr. AITCHISON: You can see the importance of it to us, Mr.

Wright. It involves the reasonableness per se of fares to Oak Grove. It would necessarily involve the rates beyond there.

Mr. WRIGHT: I am prepared to take those matters up in argument, and as I say, it is impossible if you had just that one line—if this company had just one line running to Oregon City it would be impossible to avoid comparison. You must drag in comparisons at some time.

Mr. AITCHISON: That, of course, would be a very essential element in the proof. And, if we found that the company was making too much money and perhaps paying too large a return upon——

Mr. WRIGHT (interrupting): And then you would get a comparison, because you would find that another company in another place was doing the same thing and making less.

Mr. AITCHISON: When their whole schedule in effect is involved we have to see that they get a legitimate return on their investment.

Mr. WRIGHT: You probably have seen, the commission has probably seen, that I am trying to get into this case the difference between purely suburban business and this business that goes through. Bear that in mind. We wish to separate that.

Mr. MALARKEY: The question is as to the scope of this inquiry.

Mr. WRIGHT: I have stated it both ways and the commission knows what is meant therein.

Mr. AITCHISON: The complaint is not verified.

166 Mr. MALARKEY: If he did not swear to it—I do not blame him for not swearing to it. It has been well said by commissioner Aitchison that the question of the reasonableness of any rate to any particular point it may involve the consideration of the entire earnings of the whole system and the entire expenditures of the whole system. It might mean something that will take the commission a great deal of time to render a decision upon. Now, in view of the fact that Mr. Paget here, who is the representative of the association that makes this complaint, says to you in so many words that the complaint of these people is based upon the charge of discrimination——

Mr. WRIGHT (interrupting): That is not what he said.

Mr. MALARKEY: I am frank to say that we are not prepared to go into the other questions involved at this time. I did not think that there was any question about it. The thing came out of the witness incidentally. Is this commission going to rule at this time that this inquiry is going into the reasonableness per se of this rate?

Mr. AITCHISON: I do not understand that there is any question asked to involve a ruling on that yet. Go ahead, Mr. Wright. I beg your pardon, Mr. Malarkey you asked a question along the line of five cent fares to Oregon City or somewhere.

Mr. MALARKEY: I was asking if witness did not think that if a five cent fare was granted to Oak Grove, which is 8.48 miles from Portland, that it would be unjustly discriminatory against Concord, 9.26 miles from Portland, to charge 20¢?

Mr. PAGET: The conditions are altogether different.

Q. The conditions between Oak Grove and Lents are also different, are they not?

A. Defendant's charge makes such conditions. I do know that people who live at Oak Grove have suburban residences *of* Portland. As a matter of fact I do not know——

Mr. MALARKEY (interrupting): Do you not know as a matter of fact that there are suburban residents of Portland who live farther south than Concord?

167 A. I do not know that.

Q. Is there anything to prevent people from moving to Concord the same as you moved to Center a year ago?

A. No sir; I do not know of anything to prevent them.

Q. The gist of the complaint of you people out there is because a certain ride for one certain rate is obtainable and that you people ought to have the same rate——

Mr. PAGET (interrupting): The gist of our complaint, Mr. Malarkey, is that a five cent fare has been granted by your company to points similarly situated as to distance and as to natural conditions—soil, scenery, river and the bed of the road—and one thing and another. These places have been making such wonderful advances more or less and have undoubtedly made them on account of five cent fare. Our natural advantages are of no use to us.

Q. Your theory of your complaint is that if we carry a person from Portland to Lents, a distance of eight miles, for five cents we should carry a person from Portland to Oak Grove, a distance of eight miles, for five cents.

A. I took it for granted that the legislature which created——

Mr. MALARKEY (interrupting): I did not ask you for any legal opinions.

Mr. PAGET: You helped to make that law——

Mr. MALARKEY: If the witness will answer my questions we will get into this. I will ask you again so that we will get it down in the records: Your complaint is that because the Portland Railway Light and Power Company carries people from Portland to Lents, a distance of eight miles, for five cents over its Mount Scott division it should carry people from Portland to Oak Grove, a distance of eight miles, over its Oregon City division for five cents. Is that the theory of your complaint?

A. Yes sir.

Q. Do you want this commission to understand that you people out at Oak Grove Center, Risley and Courtney claim that if you had a five cent fare out there each of these points you mention would get to be as large and prosperous as Lents and St. Johns?

168 A. Yes sir, and larger. I do not know about St. Johns—Lents is the basis of our comparison and not St. Johns.

Q. You have testified to riding from Oak Grove to St. Johns; we will say for instance, you have ridden from Oak Grove to St. Johns——

Mr. PAGET: No sir, I said I had ridden to a point on the St. Johns line.

Q. When you made that ride you paid 15¢ to ride from Oak Grove to the terminus of the line at First & Alder streets?

A. Yes sir.
Q. Did you get a transfer?
A. No sir.
Q. When you got to First & Alder streets, what did you do?
A. I walked to the corner where the starting point was at that time.
Q. Do you remember where the starting point was at that time?
A. The starting point at that time was at Third & Alder streets.
Q. And there you got on another car and paid another fare, did you?
A. Yes sir, just the same as from Lents transfer to and from some points.
Q. Now this place called Golf Junction is on the city boundary, is it not?
A. I do not know.
Q. You do not undertake to say that it is not, do you?
A. I do not know. I do know that it is somewhere near the line.
Q. Did it ever occur to you?
A. No sir, I never had it pointed out.
Q. I do not mean that you knew the particular spot.
A. I know that it is near there. If it is outside I know, of course, the line comes back into the city again on the Springwater division.
Q. Yes sir. You know that if it is outside that the line going out on the Springwater division swings to the north so that it would be inside the city limits for some little distance, do you?
A. Yes sir.
Q. You know also, do you not, that this company publishes a regular tariff or schedule of its rates?
A. I know that it keeps them on file in the office.

Q. I will ask you to look at the one in record here and say
169 whether or not you have ever seen it? (O. R. C. No. 1.)
A. Yes sir, I have seen that tariff.

Q. Now turn to page No. 7, Mr. Paget, of this book: You will notice there under heading "One Way and Round Trip Rates—Oregon City Division" referring to the fares therein stated: I will ask you if you do not know from your experience and observation that these are the fares the company charge for rides on its line between those points?
A. Yes sir.
Q. The fact is, Mr. Paget, that you can get on a car at Oak Grove or Center, or Courtney, of Milwaukee Heights, and ride to Golf Junction for 10¢; is that not a fact?
A. Yes sir.
Q. Then you can ride to any point within the city from Golf Junction for five cents on a transfer.
A. That is a fact. It is not a competent fact—it is a hidden fact.
Q. Who hides that fact?
A. The conductors on the car line hide it.
Q. How do the conductors on the car line hide that fact?
A. Unless you happen to have advice from some source that is not competent you would pay your fare through to Portland and when you desire to get a transfer the conductor will not issue one.

The only way you can get a transfer is by paying fare to Golf Junction and then paying fare from there on in when a transfer will be issued.

Q. How did you find out that could be done?

A. Somebody told me—I believe it was my wife told me some passenger had informed her to that effect.

Q. You know it, and knew before, that the ordinances of the city of Portland and the laws of the state of Oregon require street cars to carry passengers to and from points within the city limits of the city of Portland for five cents, did you not?

A. I never knew how a transfer could be obtained, or that
170 one could be obtained until informed by some one as to how to get it.

Q. If you did not know from your observation and experience that passengers getting on any of the cars of the Portland Railway Company or the Portland Railway Light & Power Company within the city of Portland and paying a five cent fare were given transfers to transfer points from the car upon which they started to other points—did you not know that they were?

A. To travel how far?

Q. Inside the city limits?

A. No sir. I know otherwise by experience.

Q. Do you say that you could not get a transfer? Where, for instance?

A. That is, provided what you stated is correct, that Golf Links is the city boundary. Let me explain to you (and this is from experience) if you travel on the O. W. P. car on Hawthorne Ave. and take a transfer on the Oregon City division the Oaks is the point to which a transfer will carry you. If you take a transfer on the Washington Street car you can travel to the Golf Links. If you take a transfer on the Washington St. division to the Springwater division the terminus of transportation on the transfer is Nickum which point is somewhat outside of the city limits.

Q. Can you transfer from a Hawthorne Ave. car to a Sellwood car that will take you to the Golf Links? Do you not know as a matter of fact that you could?

A. I did not say anything about that.

Q. You can do that though, can you not?

A. Yes sir, but that implies an additional transfer and additional time. It is not a direct transfer.

Q. How is that?

A. Because when you are travelling from Hawthorne Ave. you would have to transfer twice instead of once. You cannot transfer clear through without paying 15¢ in addition to your transfer.

Q. I asked you if you can get a transfer from Hawthorne Ave. car to Golf Links over the Sellwood line?

A. Yes sir. You asked me if I did not know as a matter of fact that I could.

171 Q. I will put it this way: Before you discovered Mr. Paget, this way of getting from your home for five cents less in getting a transfer, did you not know before that that you could board a car at Golf Links and ride to the terminus——

A. I know that I could not transfer from certain points.

Q. You say that you only discovered recently that you could get the benefit of a transfer; you said that, did you not?

A. I said I discovered it, but I did not say recently.

Q. Well you have only lived there a year, have you not?

A. Yes sir.

Q. Before you discovered that way did you not know that a passenger could get on a car at Golf Links originating there—simply originating there—like these gentlemen going out to play golf, and for five cents ride on that car to Portland and get a transfer to other divisions?

A. I think so. I do not think I have ever tested it. I may have known it in a general way.

Q. Did you ever play golf out there?

A. No sir, I never played golf out there or anywhere else in my life.

Q. You know some of those people do play golf. Now, what I am getting at is this, Mr. Paget: You talk about kinks—I do not like these sarcastic expressions—you said something about kinks that had to be gone through with. Did you not know and realize that you could, at any time you wanted to, pay ten cents to ride from Center to Golf Junction?

A. No sir.

Q. Did you not know that was the fare from Center to Golf Junction?

A. No sir, I did not know that. I was never interested in that. I understand you to be talking about the time when I first moved out there.

Q. At the time you began to get interested on the subject of fare did you not know that you could ride from Center, your home, to Golf Junction for 10¢?

A. I think I had the right to think that when I was paying my fare that they were not trying to get some thing more out of me.

172 I think I had the right to think that.

Q. And we resent the idea that anyone was keeping you from getting the knowledge.

A. I am not making any insinuation that they were trying to keep the knowledge from me.

Q. But what I am trying to ascertain you knew that you could ride from Center to Golf Junction for ten cents, did you not?

A. No sir, I did not know it.

Q. When did you first ascertain that you could?

A. When I was first informed that I could get some benefit by paying fare that way.

Q. Who informed you to that effect?

A. I think my wife did—I know she did.

Q. Where did she learn it?

A. She learned that from some casual acquaintance.

Q. Did Mr. Fuller ever try to hide the matter from you?

A. No sir; neither did they try to enlighten me. When I pay my through fare in cases of these rides——

Q. Were you ever asked to pay anything more than the fare?
A. I was asked to pay my fare and I supposed I was paying the minimum fare and I had a right to think so. I had a right to think I was paying the minimum fare to various termini and various lines in Portland.
Q. How about that terminal from First & Alder streets, what is it?
A. I do not think there is anything about that in our case as I recollect it.

Mr. AITCHISON: There is no use developing what the fare is. The tariffs show what they are.

Mr. MALARKEY: You say you have been at Nickum——
A. I said I had been through Nickum.
Q. Did you ever stop there?
A. No sir.
Q. I will ask you if it is not a fact that Nickum is the first station on the Springwater division after leaving Golf Junction—is it not the first place the cars stop?
A. I think it is.
173 Q. You do not claim that Nickum has been thriving and building up on account of having a five cent fare, do you, ahead of Oak Grove?
A. I think I have shown conclusively why it has not.

Mr. AITCHISON: How about Berkeley, the new tract which the Jacobs-Stein people put on the market, do they have a five or ten cent fare? It is at a point between Nickum and Kerrigan.
Mr. MALARKEY: They have a ten cent fare, Mr. Aitchison, beyond Kerrigan.

Mr. AITCHISON: Do you know anything as to the development of that country, particularly around Berkeley?
Mr. PAGET: No sir, I do not. I know in a general way there has been some development up through that section. It does not seem to be a suburban section in the way ours is.
Mr. WRIGHT: I want to ask you, Mr. Paget, if you have ever seen in display at the depot at Courtney, Oak Grove, Center or on the cars any circulars or little cards of any kind stating on any of these documents, posted or otherwise, that you could ride in the way you have been questioned about by paying fare to Golf Links and then paying another fare?
A. No sir.

Mr. MALARKEY: (It is only by deceiving the company that you can do it.)

Mr. WRIGHT: Have you ever received any cords or information in that manner?
A. No sir.
Q. Has there ever been any such distributed?
A. No sir.

R. W. CRANE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Crane?
A. I live at Courtney.
Q. How long have you lived there?
A. Two years and a half.
Q. What is your business?
174 A. For the last three or four months I have been in the real estate business.
Q. Have you handled real estate more or less since you have lived in Courtney?
A. Well, I have been doing some business. I have not sold very much but have considerable listed.
Q. Have you real estate listed immediately in and about Oak Grove, Center and Courtney?
A. Yes sir.
Q. Have you made any effort to sell it?
A. Yes sir.
Q. Have you been able to sell it readily?
A. No sir.
Q. State why you have not been able to sell it readily.
A. The greatest complaint seems to be that the car fare is too high.
Q. State whether or not people were satisfied with the quality of the land, or price, or other matters.
A. A good many think it suited them first rate; they like the location, soil and so on; that it would be a nice place to live but could not think of it on account of the car fare being so high.
Q. Did you inform these people what the car fare was when you asked them to buy? (Wright's letter 11-27-07.)
A. Some of them I did. I do not make it a business to tell them how high the car fare is until they make complaint to me about it.
Q. Did they raise the matter of car fare to you before you spoke of it?
A. They certainly did.
Q. What property did you have to sell—lots and acreage?
A. I had lots and acreage both.

(No cross examination.)

JOHN F. RISLEY, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Mr. Risley, where do you live?
A. I live at the first station the other side of Oak Grove—my property joins on Oak Grove property.
175 Mr. AITCHISON: Do you mean at Center?
A. I should say the first station past Center.
Mr. WRIGHT: How long have you lived there?

A. Forty-five years.

Q. Have you any property now immediately about either Oak Grove, Center or Courtney?

A. Not immediately about. I have some adjoining Oak Grove on the south.

Q. Is it property which is occupied by a residence? Is it near enough for them to take a car at Oak Grove?

A. Yes sir, they could. It would perhaps be not quite half a mile from the center of the station. You see, Oak Grove covers quite a large territory.

Mr. MALARKEY: I think counsel refers to the station, do you not?

Mr. WRIGHT: I speak of the station.

Mr. MALARKEY: Your station is Risley, is it not?

A. Yes sir, south of Center.

Mr. WRIGHT: Have you tried to sell any property which is immediately in and about the three stations I have mentioned?

A. I have.

Q. Have you met with any difficulty in effecting sales?

A. I have.

Q. What was the trouble?

A. Well, the parties would look over the land and then incidentally want to know about the car fare and I would tell them it is 15¢ and they would say "We will go back to Portland and will not buy the land." That is the reply nearly all of them made. I have not effected any sales.

Q. Did the parties know the fare when they came out to see the land?

A. I do not know whether they knew when they came out or not. Some of them came out with real estate men and I suppose they paid the fare.

Mr. AITCHISON: You have commutation books at Oak Grove and these other places, have you not, Mr. Fuller?

A. Yes sir.

Mr. A.: What are the fares to those places as they figure from these books?

A. I think 8½¢ to Center and 10¢ to Risley.

176 Mr. MALARKEY: Anybody can ride on the tickets.

Mr. RISLEY: They have printed on the books "Not good if detached."

Mr. MALARKEY: You can hand the book to anybody.

Mr. PAGET: You can not give the book to a friend or you would have none yourself.

Mr. WRIGHT: Have you noticed any increase in the travel during the last six months?

A. There has been a slight increase—not a very great increase.

Q. As far as Oak Grove, Center or Courtney?

A. There has been a slight increase, perhaps 25%.

Q. What do you think the travel was originally that went in from those places as to number of passengers?

A. I cannot say, Mr. Wright.

Q. Do you know how many go in each day now?
A. No, I do not; I have not kept tab on the proposition at all.
Q. Well, is it a large or small travel?
A. It is comparatively small travel I should judge—what I would consider small anyway.
Q. Have you ever been out to Lents?
A. I have.
Q. Have you ever been out to St. Johns?
A. I have.
Q. Compared to the travel from those places to and from Portland what is the extent of the travel from Oak Grove, Center or Courtney to Portland?
A. Well, it is not much more than one-third——
Q. I am not asking you for figures. Is the travel larger or smaller?
A. It is smaller.

Cross-examined by Mr. MALARKEY:

Q. Your station is Risley, is it not?
A. Yes sir.
Q. That is the station beyond Center, is it not?
A. Yes sir.
Q. You have some land adjacent to Risley, have you not?
A. Yes sir.
Q. And you would like to sell that land to people who come out there——
A. Yes sir.
Q. And you think you could sell more of that land if you had a ten cent fare, do you not?
A. Yes sir.
177 Q. And you think you could sell more if you had a five cent fare, do you not?
A. Yes sir.
Q. Do you not think you could sell more of it if you had no fare at all?
A. If there were no fare at all there would be no transportation.
Q. Do you not think if they were carried for nothing there would be more land sold?
A. Yes sir.
A. And do you not think the land around Risley is about as good as it is around Nickum?
A. It is better.
Q. The farther south you get the better the land is, is that true?
A. No sir.
Mr. AITCHISON: How does the land around Oak Grove compare with land around Lents?
A. It is much better.
Mr. A.: Why is the land around Oak Grove better than around Lents?
A. The land around Lents is gravelly.
Mr. A.: What difference is there between Lents and Oak Grove

besides the soil that would make Oak Grove more desirable as a place to live if transportation were equal?

A. In Oak Grove you can raise fruit trees and garden and such as that. Of course, Oak Grove lies on the Willamette River and that is quite a benefit too.

Mr. MALARKEY: Let me ask how many more witness- you have, Mr. Wright?

Mr. WRIGHT: Four more and they will not be very long. We may have to call Mrs. Clinton. You know about the character of the evidence, it will run about the same as Mr. Risley's.

(Adjourned until 2:00 o'clock p. m.)

Pursuant to adjournment commission met at 2:00 o'clock p. m. and proceeded with the hearing. Present same as in the morning.

M. G. MUNLEY, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

178 Examined by Mr. WRIGHTS

Q. Are you interested, or do you own property in the immediate vicinity of Milwaukee Heights, Center, Oak Grove or Courtney?

A. The lands we owned—I say "we", the land is owned by several—I have an interest in it with others.

Q. Where is this land of which you speak?

A. It is crossed by the Oregon City line at Milwaukee Heights. The station is on the place which we sold. The other land is situated so that it would face Center and Oak Grove, which is behind that, so that the land extends quite a distance and the tract contains 410 acres.

Q. Is there any part of it which if settled the passenger traffic would be tributary to Oak Grove or Center stations?

A. It would be tributary to Oak Grove, or rather Courtney.

Q. Judge, did you have anything to do with land subsidies given to the predecessor of this present company?

A. Yes sir, we gave land to the Oregon Railroad line. That was one of the conditions upon which they built the line.

Q. Were rights of way given to them also?

A. Yes sir; rights of way were donated by us at least and I think by the others also.

Q. Is the present right of way that is occupied by this company through Oak Grove, Courtney and Center?

A. I know that it is the present right of way over the tract which we own. It is the same right of way all the way through except a little strip this side.

Q. Besides the right of way, did the railroad company receive donations of land?

A. We donated twenty acres of our best land, worth at that time $225.00 per acre.

Q. Did you receive any consideration for that land?

A. Not except that they built the line, and they agreed to give us good service and cheap service.
Q. When was this?
A. In 1893 or 1894.

179 H. G. STARKWEATHER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you reside, Mr. Starkweather?
A. Near Risley station.
Q. Are you familiar with this railroad and the country in and about Oak Grove, Courtney or Center stations?
A. I am.
Q. How long have you lived where you say you are living?
A. About thirty-five years.
Q. Have you been over that country to any considerable extent?
A. I have been over it very thoroughly.
Q. What occupation have you followed heretofore?
A. I have followed a good many different occupations. At the present time I am farming and doing a little real estate business on the side. I have been associated with Mr. Risley for a little over five years.
Q. Have you not been superintendent of schools?
A. I was during the period from 1896 to 1898 superintendent of public schools.
Q. How long did you say you had been in the real estate business?
A. In the neighborhood of five years.
Q. Do you refer to the past five years?
A. Yes sir.
Q. Have you made efforts to sell property in and about these stations I speak of?
A. I have.
Q. I refer to property immediately next to them; have you?
A. More particularly near the Risley station, but we have attempted to sell some near Courtney station also.
Q. Now, referring to land near those three stations of which I speak, have you had difficulty in tryin*t* to sell it?
A. We have not succeeded—which three stations do you mean?
Q. Oak Grove, Courtney and Center.
180 A. We have not sold any near those three stations.
Q. Have you tried to do so?
A. Yes sir.
Q. What was the trouble?
A. One trouble, at least, was the fare charged.
Q. State what it was—you say it was the fare, state the details.
A. Fares are higher than to many other points at equal distances from Portland.
Q. Was that objection urged to you by prospective buyers?

A. It was mentioned.

Q. Was it mentioned as a reason why they would not buy?

A. Yes sir.

Q. Were you living there at the time the road was originally built over its present right of way?

A. I was.

Q. At the time the road was built through those three station-?

A. Yes sir.

Q. Do you know whether subsidies were given by persons who owned land adjoining those three stations I asked about?

A. Do you mean the lands immediately adjoining those three stations?

Q. I refer to land adjoining the right of way that passes by those three stations of which I speak.

A. I know of subsidies having been given by individuals owning land in the vicinity.

Q. Who were those individuals?

A. I know, for one, Mr. J. S. Risley gave between 17 and 18 acres outside of the right of way. He gave right of way free also and this subsidy in adition, making about 20 acres in all.

Q. Did Mr. Breyman give any subsidies or right of way through there?

A. Mr. Breyman?

Q. Yes, sir, Mr. Breyman?

A. I do not know that party.

WITNESS: There was a Mr. Knapp farther south who gave a subsidy in addition to right of way.

Cross-examined by Mr. MALARKEY:

181 Q. Where do you live, Mr. Starkweather?

A. About a mile from Risley station, southeast.

Q. In coming to and from the Oregon City div. of the Portland Railway Light & Power Company do you ride on the cars?

A. Yes sir.

Q. You lived there before the electric line was built, did you not?

A. Yes sir.

Q. Before the electric line was built what means of transportation was employed to go to Portland from that section of the country?

A. We frequently drove with a wagon, and sometimes we drove to the river and came in a boat.

Q. Would you go back and forth on the trains of the Southern Pacific Company?

A. Very seldom; we did occasionally.

Q. What station of the Southern Pacific Company served you?

A. Milwaukee station.

Q. Was that the nearest station?

A. I doubt if it was the nearest, but it was the nearest by the road we usually traveled.

Q. How far would you have to go from Risley to Milwaukee to

get a Southern Pacific car—to the place you would have to go to get a train to go to town?

A. From where I live it would be about three miles.

Q. You would have to walk three miles if you wanted to go by boat or go by private conveyance, would you?

A. Yes sir.

Q. What is the nearest station on the Southern Pacific to Risley now?

A. The nearest station is probably Clackamas; in a direct line it would be a little nearer than Milwaukee.

Q. What is the fare from Clackamas on the Southern Pacific Company's line?

A. I do not know.

Q. What is the fare from Milwaukee to Portland on the Southern Pacific?

A. I do not know.

Q. What is the fare by boat from Risley to Portland?

A. I think the fare is 25¢ but I am not sure.

182 Q. The boats of the Oregon City Transportation Company are the boats that stop there, are they not?

A. Any of them stop there.

Re-examined by Mr. WRIGHT:

Q. Mr. Starkweather, is there any road—convenient road—leading to this Clackamas station you have spoken about from Oak Grove, Center and Courtney?

A. Not very direct.

Q. How far is it around by the most convenient road?

A. I am inclined to think it would be considerably over three miles.

Mr. MALARKEY: Do you want us to build the road?

Mr. WRIGHT: You brought this out.

Mr. WRIGHT: Is that the only road there at present to get over to Clackamas—this road that is three miles around?

A. That is the most usual way of getting there.

Q. Is that road the most direct one from there to Clackamas?

A. Yes sir.

Q. Does the Southern Pacific Company run a service between Portland and this Clackamas station every thirty-five minutes?

A. No sir.

Q. Has the Southern Pacific ever done so?

A. No, not regularly.

Q. What do you mean by "not regularly"?

A. I think not at all, not to my knowledge.

Q. Do they offer to transport passengers daily on such services as that?

A. Not that I know of.

Q. Have they made any effort that you know of to get passenger traffic from Oak Grove, Courtney and Center stations?

A. I do not know of any such effort.

Q. Have the boats on the river made any effort to get that passenger traffic?

A. I think, years ago, they did make some effort.
Q. Have they made any effort to keep that traffic, or to get it, since the defendant railway has built through there at those stations?
A. I could hardly testify as to that; I do not know of any effort made recently.
183 Q. Have you seen any solicitors around to get passengers to travel by these boats to Portland?
A. No sir.
Q. Do they land there every thirty-five minutes?
A. No sir.
Q. If you wanted to travel by a boat is there any station down there to take the boat from?
A. Do you mean a building?
Q. Yes sir, I mean a building.
A. No sir, there is not.
Q. Is there any method of taking that boat except by going down and hailing it?
A. Not that I know of.

(Excused.)

JULIUS BROETJE, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Broetje?
A. Courtney station.
Q. How long have you lived at Courtney station?
A. About ten years.
Q. What is your business?
A. Florist and nurseryman.
Q. Have you been in that business at all times?
A. Yes sir.
Q. What do you sell?
A. Mostly ornamental shrubberies.
Q. Do you sell roses mostly?
A. Roses, cut flowers and so on.
Q. Do you have trade in Portland?
A. Yes sir.
Q. Do they come to your nursery to buy stock?
A. Yes sir, quite often.
Q. Have you had any complaint from your customers in regard to the difficulties of trading with you out there, and if so, state what they are?
A. Yes sir; they say they would purchase more but that 15¢ car fare is rather high.

(Excused.)

184 HENRY HEITKEMPER, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Heitkemper?
A. I live at Oak Grove near Courtney station.
Q. Do you live between the two stations of Oak Grove and Courtney?
A. Yes sir.
Q. How long have you lived there?
A. Eleven years.
Q. Do you own any property there?
A. Yes sir.
Q. What do you own there?
A. I own pretty nearly eight acres there?
Q. How long have you owned that property?
A. I owned one piece—four acres, eleven years, and the other piece—about five or six years. I do not remember exactly.
Q. During the time you have been there state if you know the increase in the number of houses that are built or have been built in and about Oak Grove, Center and Courtney—has it been large or small?
A. I think it was not very large. I could not exactly remember, there might be about twenty houses built since then, all told—shacks and all.
Q. Do you know anything about the increase in population in and near those stations—whether that has been large or little?
A. Not so very much. It is about the same thing around Courtney station except one or two or three houses more than when I first came there.
Q. Have you tried to sell any land in and about those stations?
A. No, not exactly, but the people came to me. You see, I was there first and the people came to me and asked me about pieces of land, and real estate men came there and stopped off at my place and wanted to show people how things were growing so as to encourage them like that. I was never in the real estate business myself.
Q. Is the land easy to sell or slow?
A. It is slow selling.
185 Q. Do you know any reason why that is true?
A. They kick on the fare, especially strangers, you know. They did not know the fare and when they find out they say it is too high and they would rather be where they would have a little cheaper fare. That is all I heard about it. You see, they first charged 25¢ for a round trip and after a while they raised to 15¢ straight. You see they had different arangements about the fare, you know. When I first came there it was 8¢ to Oak Grove. That meant Oak Grove the way Oak Grove was platted and there was no Center and no Courtney—just Oak Grove or wherever they had a station—little platform where people got off. After awhile they

put up a sign half way and called that Oak Grove and charged 8¢ to there and more from there on.

Mr. AITCHISON: That was on commutation tickets, was it not?

A. Yes, sir. Then when the first company sold out they charged 8¢ and when they had some kind of trouble they charged by commutation ticket 10¢. Of course we paid it. After awhile (I do not know what happened) it came down to 8¢.

Mr. WRIGHT: Do you know whether right of way past Courtney, Oak Grove and Center stations was given to the road?

A. As far as I know there was given to the road forty acres.

Q. Do you know who gave that forty acres?

A. The Oak Grove Company—they gave it for right of way.

Q. Who were the principal men?

A. Breyman, Merritt and Hyler. Merritt was the secretary and Breyman was the president.

Q. Do you know whether they gave the railroad any subsidy outside of the right of way?

A. I could not tell exactly as to that. I do not know.

Cross-examined by Mr. MALARKEY:

Q. Your station is Oak Grove, is it not?

A. No, sir, it is Courtney, that is the nearest. They stop right in front of my place and this other company they said they stopped there for nine years. What they called (Witness interrupted by Mr. Wright whispering to him).

186 Mr. MALARKEY: I object to counsel talking to witness while he is being cross examined.

WITNESS: That was Courtney station, and then came my station, which was Elkhorn station. Then after awhile they took my station off and put it up where they call Oak Grove.

Mr. AITCHISON: The present commutation rate to Oak Grove is 8¢, is it not?

A. Yes, sir. (Mr. Malarkey.)

Mr. MALARKEY: The rate has never been any less than that since the station has been there, has it?

A. No, sir.

(Excused.)

THOMAS HOWELL, a witness produced on behalf of the plaintiff, after being duly examined and sworn, testified, as follows:

Examined by Mr. WRIGHT:

Q. Where do you live, Mr. Howell?

A. I live at Center station, in Oak Grove.

Q. How far away from it do you live?

A. From the station?

Q. Yes, sir.

A. About 300 feet.

Q. How long have you lived in that neighborhood?

A. I cannot say exactly, but nearly five years.

Q. How long have you lived in the vicinity of Oak Grove, Center and Courtney?

A. Four years.

Q. Did you understand me—I am asking how long you have lived in the vicinity of Oak Grove, Center and Courtney—anywhere near those stations?

A. Why, five years.

Q. Where did you live before that?

A. I lived at Oregon City and Willamette Falls,—rapids.

Q. I thought you lived there longer. Do you own any property in the vicinity of those three stations?

A. I do.

187 Q. What property do you own near there?

A. I own a small lot on Center Ave.

Q. Is that near Center station?

A. 130 feet from it.

Q. What business have you been in?

A. Merchandise mostly.

Q. Where is your business?

A. Oak Grove.

Q. When did you have a store there?

A. Most of the time—I was out of business a year. I have a store now.

Q. State when you first went into business there?

A. I think it was four years ago—about four years ago.

Q. Were you postmaster there at any time?

A. Yes, sir.

Q. At what time was that?

A. The post office was established in 1903, January, 1903. I am not sure about the date.

Q. Were you then running a store there?

A. Yes, sir.

Q. Did you have occasion to count up the population about that time?

A. Yes, sir.

Q. Did you do so?

A. Yes, sir.

Q. Do you know about what the population was then for what territory you counted it?

A. The territory was from Milwaukee Heights to Risley station and I estimated the population at 300.

Q. What occasioned your counting it up at that time?

A. I counted it on account of getting the post office established.

Q. Yes, sir, but what were you doing in order to get it established?

A. I had to get up a petition and have it signed by those who would be served and the government required me to make a close estimate of the number of inhabitants within the delivery of the office.

Q. Now, do you wish to be understood that this territory is along the line of the railroad between Milwaukee Heights and Risley stations?

A. Yes, sir.

Q. How far on either side of the railroad do you include?

188 A. From the County road on the east to the river on the west.

Mr. AITCHISON: How far is that county road?

A. One half mile east.

Mr. A.: How far is it to the river?

A. About half a mile.

Mr. A.: Do those people all use this car line in that district?

A. Yes, sir, More or less.

Mr. WRIGHT: Is there any travel by people in that district regularly to Oregon City by the boats?

A. No, sir.

Q. How many houses do you think there were, if you know, at this time you became postmaster and circulated that petition?

A. I do not know as to taking in the whole of that territory from Milwaukee Heights, but from Courtney—the south line of Courtney—to the Risley line on the south there was 20 houses at that time, when I moved there.

Q. How many stores were there in and about those three stations I mentioned?

A. There were two that you might call stores.

Q. Did those two stores have large or small stocks?

A. Very small stocks.

Q. Have you been over that same territory frequently during the last year?

A. Yes, sir.

Q. Have you noted the increase in population and increase in the number of houses, if any?

A. Yes, sir.

Q. What do you estimate the present population to be in that same district that you speak of?

A. Do you mean of the smaller district, or——

Q. The district where you said you made the population 300?

A. There are now probably about 60000 something close to that.

Mr. AITCHISON: It has doubled in what length of time—six years?

A. It has doubled in five years.

Mr. WRIGHT: Has there been any ready or constant sale of property in that district during the last five years?

A. Yes, sir; there have been sales.

Q. Has there been a ready sale—easy sale?

A. Well, not very easy. I have tried to sell some myself and did not succeed.

189 Q. Have the sales been very frequent in that district?

A. No, sir; not very frequent.

Q. Do old residents go away from there?

A. Yes, sir.

Q. Do you know the reason why they leave?
A. Several of them have told me their reason for leaving was poor service.
Q. State the reason, if you know.

Mr. MALARKEY: I object to that as hearsay evidence.
Mr. AITCHISON: Objection is overruled.

WITNESS: The reason they told me was poor service and high fares on the cars.
Q. Have you been trying lately to sell real estate?
A. Yes, sir.
Q. Have you been successful?
A. I have not.
Q. What was the reason for your being unsuccessful in selling real estate?
A. The reason they will not buy is because of excessive fares as they would understand it.
Q. Did you explain about these commutation tickets to them?
A. Yes, sir.
Q. Were they not satisfied when you explained that?
A. No, sir.
Q. Did they ever ask you about transfers?
A. No, sir.
Q. Do friends of people residing there go out with great frequency to visit them?
A. No, sir.

Mr. MALARKEY: That is an advantage.
Mr. WRIGHT: It might be.

Q. What was their reason for not doing so, Mr. Howell?
A. As to their real reasons I could not say. They would hardly complain to me of the fare being too high.
Q. Were prospective buyers you offered real estate to satisfied with the location and the price of the land offered?
A. Usually, yes, sir.

Cross-examined by Mr. MALARKEY:

Q. Did you say they were satisfied with the price of the land?
A. Usually.
Q. Why did they not buy it then?
A. On account of the car service and fares.
190 Q. Then they were not satisfied with the price of the land in view of the car service and fares—you mean they were satisfied with the price of land if the fares were cheaper, do you not?
A. Yes, sir.
Mr. MALARKEY: In other words, if there were a five cent fare the price of the land would have been satisfactory? Is that the case?
A. Yes, sir.
Mr. AITCHISON: Were these people who were talking about buy-

ing intending to buy for speculation or were they figuring on buying for homes?

A. For homes.

Mr. A.: What size tracts were they figuring on buying?

A. Any size up to five acres—usually wanted one.

Mr. MALARKEY: Who were they—do you know the names of these persons?

A. No, sir, they were strangers.

Mr. M.: Can you give this commission the name of any person who was figuring on buying land from you?

A. I do not think I can just now. They were usually strangers to me.

Mr. M.: How did they get out there—on the cars?

A. Yes, sir.

Mr. M.: They knew the fare when they went out, did they not?

A. Yes, sir, I expect they did.

Mr. M.: How long has it been since you tried to sell any land to anybody?

A. I try to sell land every day—to anyone who comes along.

Mr. M.: How long has it been since anyone came along—do people come along every day?

A. Yes, sir, but very few sales.

Mr. M.: Perhaps you asked too much for the land?

A. I never heard them complain in regard to the price of property.

Mr. AITCHISON: What price do you ask for one acre of good land?

A. For the best land there we ask from $500.00 to $600.00 per acre.

Mr. WRIGHT: Mr. Howell, is a good deal of that land cut up now into town lots?

A. Yes, sir.

Q. Are those lots of the usual size—50 feet by 100 feet?

A. Over half of them are 50′x100′.

191 Q. What is the size of the others?

A. 50′x130′ to 145′.

Q. Fifty feet is the width, average width of the lots, is it?

A. Yes, sir that is the average width.

Q. State whether or not it is possible to sell these fifty foot lots out there very readily.

A. I have never succeeded in doing so.

Mr. CAMPBELL: What are lots selling at out there?

A. From $150 to $500 according to the location.

Mr. WRIGHT: I do not think he understood the question.

WITNESS: I answered.

Mr. CAMPBELL: Can a man pay $500 to $600 per acre for that land out there and make a living on it?

A. Hardly.

Mr. C.: Do you think it is not productive enough to make a living on it?

A. He might, yes sir.

Mr. WRIGHT: Would he be able to make any improvements on his land but his labor?

A. I think not to any extent.

Mr. W.: Would he on one of these $150.00 lots you speak of—could he make a living on it?

A. I think not.

Mr. MALARKEY: Why do you ask so much for the land if a man cannot make a living on it?

A. Why do they ask so much in the city?

Mr. M.: Is that what you are trying to do—get as much for land as they do in the city?

A. No, sir.

Mr. AITCHISON: When you go to gardening this land what can you raise well?

A. The land grows very nice crops—all kinds of fruits.

Mr. AITCHISON: But you cannot realize a profit of $200 or $300 per acre like onions or those very intensive crops, can you?

A. No, sir.

Mr. WRIGHT: How long does it take crops to mature up there——

Mr. MALARKEY: How do walnuts do up there?

192 A. I have not seen anyone try to raise them.

Mr. M.: They have chestnuts up there, haven't they?

A. Mr. Risley has lots of chestnuts.

(Excused.)

Mr. WRIGHT: Mr. Paget thinks he made some error in those mileage distances when you were asking about them.

Mr. PAGET: I did make a mistake when I was asked as to the distance from Milwaukee Heights to Lents, there was an error there in the figures.

Mr. MALARKEY: Immediately after that somebody said there was no controversy as to the records.

Mr. WRIGHT: I did not admit that. I said I believed they were exactly alike. I still think so.

Mr. AITCHISON: We had better take a recess of about four minutes and find out.

(Counsel and commission check up records and find they agree as to distances.)

Mr. WRIGHT: We will agree on whatever the schedule shows.

Mr. AITCHISON: Whatever the tariffs show?

Mr. WRIGHT: We will admit the tariff sheets.

Mr. AITCHISON: Let the records show as to the distances as set forth in tariff O. R. C. No. 1 of the defendant may be considered as proven.

Mr. WRIGHT: I believe that is all we have here. Mrs. Clinton we find is sick in bed so that it is impossible for us to segg*r*egate the immediate district around Lents.

Mr. MALARKEY: We stipulate that Mrs. Clinton would testify to that if she were here. (Refers to card held by Mr. Wright, which has not been described.)

Mr. AITCHISON: It is admitted that Mrs. H. M. Clinton of the

Pope Directory Company, if sworn, would testify to the effect that the names listed in the Portland City Directory for the district embracing from the Section line road, three sections south to the south line of Woodstock and on the line of said limits would be as follows:

1903, 130 names; 1904, 1358 names; 1905, 1794 names; 1906, 2656 names; 1907, 3608 names. That in estimating the
193 actual population in that district based on directory names she would multiply those numbers by three and one-half.

Mr. MALARKEY: Do you rest? I just want to ask a few questions to see what you will admit. Will you admit that under the franchises of the Portland Railway Light and Power Company under which it operates its cars in the city of Portland is prohibited from charging more than 5¢. for any one continuous ride within the city?

Mr. WRIGHT: Entirely within the city? Do you say that the franchises so provide?

Mr. AITCHISON: Do you want to take Mr. Malarkey's word for it?

Mr. MALARKEY: I thought everybody knew that the franchises of the Portland Railway Light and Power Company under which it operates so provide.

Mr. WRIGHT: I understand that only applies to lines within the city.

Mr. AITCHISON: Could you quote those franchises?

Mr. MALARKEY: I can quote it substantially—that they shall not charge more than five cents for one continuous ride over its line within the city. Will you not admit that the franchises so provide?

Mr. WRIGHT: I will stipulate that if you so introduced the franchises of the defendant they would so show.

Mr. WRIGHT: I wish to object to the testimony as immaterial, incompetent and irrelevant and not within the jurisdiction of the commission.

Mr. SEABROOK: That is what we claim and were about to say. We agree on that.

Mr. WRIGHT: When you are dealing with fares outside of the city you are within the jurisdiction of the commission. There is one thing, I do not want to have it understood that I waive my objections.

Mr. MALARKEY: You will admit, as I understand it, that the company sells commutation books, each containing twenty coupons, and each of which entitles the bearer to ride to and from the following stations at the following rates: $1.60 for Milwaukee Heights, $1.60 for Oak Grove, $1.70 for Center and $2.00 for Risley. You admit that, do you not?

Mr. WRIGHT: Why, yes sir, whatever the tariffs show. We cannot dispute their tariffs on file.

194 Mr. MALARKEY: Mr. Paget spends $20.00 a month on those commutation tickets and he knows. He can tell you. I suppose you also admit that Golf Junction on the southern boundary of Portland is the junction to the Springwater division, do you not?

Mr. WRIGHT: In the matter of these schedules, I presume you are to be understood that fares charged from Oak Grove, to-wit, 15¢, includes passage to 1st & Alder sts.?

Mr. MALARKEY: To make that clear Golf Junction is included as a station.

Mr. MALARKEY: I do not know whether or not, after having that contract identified by Mr. Brodie, I introduced it in evidence. I do not know whether I did or not. I will now offer in evidence the contract between the Portland, Chicago and Mount Scott Railway Company and the Portland and Oregon City Railway, being the contract which was identified and referred to by witness G. A. Brodie when called upon the stand and marked Exhibit 1.

Mr. WRIGHT: And to which plaintiff objects as being immaterial and irrelevant.

Mr. WRIGHT: I understand the commission will reserve its ruling?

Mr. AITCHISON: It will on those.

Mr. WRIGHT: We wish to note objections as we go along.

Mr. MALARKEY: Is the contract not received?

Mr. AITCHISON: It is received subject to the objection.

Mr. MALARKEY: I understood all these rulings were made——

Mr. AITCHISON: When they seem to embody the crucial of the entire question we will reserve the ruling.

Mr. MALARKEY: Now, we will ask for adjournment until to-morrow morning.

Mr. WRIGHT: Mr. Paget says he must go up to the bank.

Mr. MALARKEY: In the matter of arguments, if I may ask the commission, would it not be better to have both cases argued together. Though not entirely the same the issues are very much the same.

Mr. AITCHISON: We would like to have it that way, and would like to know whether counsel would be able to furnish us with briefs in addition to the evidence?

195 Mr. WRIGHT: If the commission would like to have a brief I would like to furnish one.

Mr. MALARKEY: I think proper that briefs should be furnished.

Adjourned at 3:30 p. m. until 9:30 tomorrow morning.

Pursuant to adjournment commission met at 9:30 a. m. Present same as yesterday, except Mr. Paget, who is absent.

Mr. MALARKEY: I desire to have introduced testimony in behalf of the defendant and I now move this commission to dismiss this proceeding for the reason that there has been no evidence presented to this commission upon which it can predicate any finding that the rates of fare charged to the points of Oak Grove and Courtney, and the other points mentioned in the complaint as complained of herein are unreasonable or unjustly discriminatory, and that on the other hand it affirmatively appears from the evidence introduced by the complainant that the rates complained about to those points are reasonable and are not unjustly discriminatory.

Mr. AITCHISON: That will be considered on the final submission of the case.

Mr. MALARKEY: We will call Mr. Richmond.

Mr. WRIGHT: Mr. Paget cannot be here and he handed me a copy of the constitution and by-laws of the association. I want that introduced.

Mr. AITCHISON: I do not see that there is any point. Mr. Paget's interests appear in his testimony.

A. H. RICHMOND, a witness produced on behalf of the defendant, after being duly examined and sworn, testified as follows:

Examined by Mr. MALARKEY:

Q. What is your business, Mr. Richmond?

A. Civil engineer.

Q. What is your present occupation?

A. Engineer of the Portland Railway Light and Power Company.

Q. Have you held any official position in this city or county?

A. Yes sir—county surveyor here.

196 Q. For what length of time were you county surveyor of Multnomah County?

A. For two years.

Q. How long ago was that?

A. I think it was in 1905; it was before the present county surveyor.

Q. Were you the last county surveyor before the present county surveyor?

A. Before Mr. Holbrook.

Q. And Mr. Holbrook was elected in 1906, was he not?

A. I think in 1905.

Q. Are you familiar with the lines of the Portland Railway Light and Power Company and with those lines which are known as the Oregon City div., being the line that runs from Portland to Oregon City, and the Mount Scott div., being the line that runs from Portland via Mt. Tabor to Lents, and the Springwater div., being the line that runs to Cazadero?

A. Yes sir.

Q. Now, do you know where the station and point known as Golf Junction is located?

A. Yes sir.

Q. Is that point located at the junction where the Springwater and Oregon City line divert and the Oregon City line continues up along the east bank of the Willamette River and the Springwater div. goes east?

A. Yes sir, at the intersection of 13th St. & Ocoshoe Ave. (?)

Q. Where is that point and station known as Golf Junction with reference to the southern boundary of the city of Portland?

A. Right on the boundary. The southern boundary of the city is on Ockoshoe St.

Mr. AITCHISON: Which station are you discussing—there are two stations?

A. The junction is right on the boundary. There is a little wye that comes in there from the river side and the station is just on the north side of the track that goes out to Springwater. Right inside of the wye.

Mr. AITCHISON: Where is the station on the Oregon City line?

Mr. WRIGHT: Take a piece of paper and mark it out.

(Witness draws diagram.)

WITNESS: The city boundary runs to the south line of
197 Ocoshoe St. The city boundary is, I think, on the south line of the street.

Mr. AITCHISON: Where do the Oregon City cars stop?

A. They stop almost exactly on the line as nearly as I can determine. The little station is right here at the point marked "A" on the plat.

Mr. MALARKEY: Is the south line of Ocoshoe St. the southern boundary of Portland?

A. Yes sir.

Q. Is any part of the Oregon City division, the line of the Oregon City div. of the Portland Railway Light and Power Company between Golf Junction—the stopping place at Golf Junction—and First and Alder Sts. or any part of the said line between the said points outside of the city of Portland?

A. No sir, the line between the station and First & Alder Sts. is all within the city limits.

Q. And First & Alder Sts. is the Portland terminus of the line, is it not?

A. Yes sir, comes around the loop there at Alder St.—the Oregon City cars do.

Q. Do you know where the station of Nickum is on the Springwater div.?

A. Yes sir.

Q. I will ask you if there is any station or stopping place on the Springwater div. between Golf Junction and Nickum?

A. No sir.

Q. How far is it on the Springwater div. from Golf Junction to the point within the city boundary of the city of Portland where that line of the Springwater div. leaves the city?

A. It is 3037 feet.

Q. Is any part of the line of the Springwater div. between Golf Junction and the point where it crosses the boundary of the city of Portland 3037 feet from Golf Junction outside of the city of Portland?

A. No sir, it is not. It goes right down the center of Ocoshoe St. and branches off to the left. It is all inside the city limits.

Q. Referring, for instance, to this map marked "Defendant's exhibit 7" and this red line representing the Springwater div., and this blue pencil line representing the city boundary, and this black dot with the word "Nickum" in lead pencil right alongside the station of Nickum: What I want to know is whether or not any part of the Springwater div. from the time it leaves Golf Junc-
198 tion until it crosses the city boundary as marked on the map goes outside the city limits?

A. No sir.

Q. Now, Mr. Richmond, you have stated that the distance from Golf Junction to the place where the Springwater division crosses the line of the city boundary is 3037 feet. Now, how far is it along that same line from the place where the line so crosses the city boundary to Nickum?

A. It is 3060 feet—that would be from the city limits to Nickum.

Q. Then the city boundary is within a few feet of being half way between Golf Junction to Nickum? Is that true?

A. Yes sir.

Q. How far is it from Lents to Lents Junction on the Mount Scott div. of the defendant company?

A. It is 3385 feet.

Q. Do the cities of Portland and St. Johns adjoin?

A. Yes sir, the boundary line is identical, I think it is on Ida street.

Q. But it is the boundary line of Portland and St. Johns—north boundary of Portland and south boundary of St. Johns—the line is common and identical, is it not?

Q. The line between Portland and St. Johns would be almost north and south, you know.

Q. Because of the turn in the river down there, do you mean?

A. Yes sir.

Q. Well, at all events, the place where they come together the line is identical and common boundary line, is it not?

A. Yes sir.

Q. Does any part of the street car tracks, or line, of the Portland Railway Light and Power Company which is operated between Portland and St. Johns go outside of the corporate limits of Portland and St. Johns?

A. No sir, it is all within the limits of Portland and St. Johns. That is, it is either in St. Johns or Portland.

Q. There is no part of that line at any time that is neither within the corporate limits of Portland or St. Johns, is there?

A. No sir.

Q. How much of the Portland-St. Johns line is within the city of St. Johns as compared with the part that is within the city of Portland?

199 A. But a very small portion of it. I have the figures in the office but I could not give it to you off hand. It is but a small portion that is inside of St. Johns as compared with what is within the city of Portland.

Q. As an estimate, without exact figures, what proportion—what percentage of the whole line is within St. Johns?

A. I do not remember. I could not give a very clear estimate. I could with a map though.

Mr. MALARKEY: That is all for the present. You can look that up and I may call you later.

Cross-examined by Mr. WRIGHT:

Q. There is one thing: You speak of this Golf Junction—is that station on the property of the Golf Links people—I do not know what their association is called—is it built on their property?

A. I think not—I think it is built on the right of way.

Q. Is any part of it built in Ocoshoe St.

A. I think it is almost on the—I would not be exactly sure of the location of this station on Ocoshoe St. I think it is near the center line.

Q. Near the center line of what?

A. Ocoshoe st.

Q. If you are coming back here I would like to have you state.

A. I can locate it exactly on the street line, but I would not say exactly on the center line or exactly on the south line of the street.

Q. I should like to know whether that station or any part of it is clear in Ocoshoe St.

Mr. MALARKEY: Mr. Richmond will not be called back. I will say right now, as far as we are concerned, we are undertaking to show it is on the city boundary.

Mr. WRIGHT: If he does not know where that is let him so state.

Mr. MALARKEY: He stated as near as he is able. I would not have brought him on the stand to testify to that whole case.

Mr. WRIGHT: You do not know whether any part or the whole of that station is within the limits of Ocoshoe st. do you, Mr. Richmond?

200 A. I do not know the exact distances from the center of the street.

Q. Do you know whether any of the building is within Ocoshoe St.?

A. I think it is.

Q. You think a part of it is, is that what you mean?

A. I think the building is practically on the street.

Q. Practically on the street, did you say?

A. Yes sir.

Q. That is, it stands northward from the south line of Ocoshoe St., is that it?

A. I think it is; I am not positive.

Mr. MALARKEY: Do you know that as far as that station is concerned—do you know who built that station or who maintain it—whether built by—I mean the station house—whether built by the Golf Links people or the company?

A. No sir, I do not know.

(Excused.)

W. B. MULCHAY, a witness produced on behalf of the defendant, after being duly examined and sworn, testified as follows:

Examined by Mr. MALARKEY:

Q. What is your position, Mr. Mulchay?

A. Traffic agent of the Portland Railway Light and Power Company.

Q. Are you familiar with the passenger tariffs and fares charged by the Portland Railway Light and Power Company upon its Springwater and Mount Scott and Oregon City Divisions as set forth in the Portland Railway Light and Power Company's passenger tariff known as O. R. C. No. 1?

A. I am.

Q. Referring to the Springwater div. and the service which is maintained thereon as an interurban service between Portland and Cazadero and intermediate points: Do the cars on that line stop at other than regular stations or stopping points?

A. No sir.

Q. What is the first station or stopping point on that line beyond the actual boundary of the city of Portland?

A. Nickum.

201 Q. What is the last station or stopping point on that line as you go out towards Cazadero before you reach Nickum?

A. Golf Junction.

Q. Is there any station or stopping point on that line between Golf Junction and Nickum?

A. No sir.

Q. Is there any station or stopping point on that line at the place where the line actually crosses the city boundary and goes out of the city of Portland?

A. No sir.

Q. Do you know what the situation, condition and topography of the country is at that point where the line crosses the city boundary?

A. Yes, sir, I am pretty familiar with it.

Q. What is it?

A. Do you mean as to whether a station could be established?

Q. Yes sir.

A. Nickum is the only point where a station could be established after leaving the city boundary line.

Q. Do you know where that big cut is through there?

A. Yes sir.

Q. I will ask you where that is with reference to the city boundary?

A. As to the distances, do you mean?

Q. Does the city boundary go through that cut?

A. No sir, it does not. It is this side of the cut?

Mr. AITCHISON: Do you mean west?

A. Yes sir.

Mr. MALARKEY: There is a deep fill there west of the cut, is there not?

A. Yes sir.

Mr. AITCHISON: Where the cars of the Southern Pacific cross the track?

A. Yes sir.

Mr. MALARKEY: Does the city boundary cross the line at that fill?

A. I do not think it does.

Mr. MALARKEY: May I withdraw Mr. Mulchay a moment, I want to ask Mr. Richmond a couple of questions?

Mr. MALARKEY: Mr. Richmond, referring to the Springwater div. and the place where the line of the Springwater div. crosses
202 the city boundary about 3000 feet east of Golf Junction and 3000 feet west of Nickum, I will ask you to state what is the character of the track and the topography of the country around there with reference to the track at that point?

A. The line, after it passes 19th st., starts in to a fill at that point and the fill gradually increases until it gets to the Southern Pacific railroad track and where the east boundary of the city limits crosses and intersects that fill I should judge probably about 15 feet or 20 feet deep about that elevation. Starts in a fill at 19th st. and slopes right down to the creek bed from there and fill raises up above the creek bed and over the Southern Pacific Company's tracks and makes a fill I should judge of about 15 feet.

Q. Then the city boundary crosses the track of the Springwater div. right on that fill, does it?

A. Yes sir.

Q. And at the point described you think the fill at the track would be at least 15 or 20 feet higher than the natural level of the surrounding country, do you?

A. Yes sir.

Q. And as to this fill, Mr. Richmond, what is the length of the fill approximately. I mean whether a short fill or a long fill—what is the length of the fill?

A. I do not know exactly, but it is across that whole bottom.

Q. Is it one quarter or one half of a mile?

A. It is in the neighborhood of about 2000 feet I should judge.

Q. You think about 2000 feet, do you?

A. Yes sir.

Q. Are you able now to give an estimate of the percentage of the St. Johns line that is within the city of St. Johns?

A. No sir, not exactly, but I should say about one and one-half miles from the dividing line between Portland and St. Johns—about a mile and a half. It is about nine miles from here to St. Johns so that would be the proportion.

Q. Now referring back to the point where the city boundary crosses the line of the Springwater div.: Are there any streets or roads or highways at that point?

A. No sir, not improved.

203 Mr. WRIGHT: At what point do you refer to?

Mr. SEABROOK: The point where the Springwater div. crosses the city boundary.

Mr. MALARKEY: That is all, Mr. Richmond.

(Excused.)

Mr. MALARKEY: Now, Mr. Mulchay, will you state to the commission why it is in the estimation of the passenger tariffs on the Springwater div. that a five cent fare is charged to and from Nickum though it is about half a mile beyond the city boundary?

A. It was because Nickum was the only station, or rather, the first station east of the boundary line where a rate could be established. It is the first stop east of the city boundary line.

Q. In other words, if you charged more than five cents to Nickum, which is the first stopping place beyond Golf Junction, any passenger riding upon the cars has a right to ride in the city of Portland for five cents and could not insist upon having the cars stop and let him off there, is that what you mean?

A. Yes sir.

Mr. WRIGHT: That is a little bit leading.

Mr. MALARKEY: As a matter of fact I think it is manifest. I do not think it is necessary.

Mr. AITCHISON: That is all right.

Mr. MALARKEY: Referring to the point known as Lents Junction, Mr. Mulchay, which is, as has been testified to here, about one-half mile from Lents and is the point where the Mount Scott div. and the Springwater div. come together; I will ask you whether or not passengers coming from the stations known as Gilbert and Gates and other stations east thereof or towards Cazadero on the Springwater div. are, upon payment of the fare stated in this tariff, to Lents Junction given a transfer to the Mount Scott div. so as to get to Lents——

Mr. AITCHISON (interrupting): Given a transfer on the Springwater div., do you mean?

Mr. MALARKEY: Changes to Lents.

204 Mr. MALARKEY: For the same fares as the tariff shows to Lents Junction?

A. Yes sir.

Q. Referring now to the diagram marked "Exhibit 7"; the fare from Gilbert to Lents Junction as shown by this O. R. C. No. 1 is five cents. Now, if a passenger gets on at Gilbert and wants to go to Lents is he given a transfer at Lents Junction, which for the same five cents will carry him to Lents?

A. Yes sir.

Q. The fare, for instance, from Gates to Lents as shown by this tariff is 5¢. If a passenger gets on he can go from Gates to Lents for five cents by riding to Lents Junction and there being given a transfer for the same five cents, can he not?

A. Yes sir.

Q. And in the same way a person can get from Lents to Gilbert for 5¢, can he?

A. Yes sir.

Q. And from Lents to Gates for 5¢, can he not?

A. Yes sir.

Q. And each time can get a transfer at Lents Junction, can he not?

A. Yes sir.

Q. It is also shown in the tariff schedules—this O. R. C. No. 1—but so as to bring it out in this connection, I will ask you whether it is not a fact that the fare from these points, Gates and Gilbert here is five cents also?

A. Yes sir.

Q. And now what is the fact—state whether or not passengers boarding the cars or riding from Golf Junction on either the Springwater div. cars or the Oregon City cars into Portland can secure upon request transfers to any of the connecting lines of the Portland Railway Light and Power Company or the Portland Railway Company?

A. They can secure transfers by paying their fares to Nickum.

Q. Now just a minute. I wish to have this question read to you and have you answer the question (Stenographer read the last question to witness) Can they do that or not?

A. They can secure transfers.

Q. In other words, Golf Junction is a station within the city of Portland and any person getting on there gets transfers the same as city passengers, is that it?

205

A. Yes sir.

Q. Now, the regular tariff from Oregon City to Portland terminal at 1st & Alder sts. as shown by O. R. C. No. 1 is 25¢, and the regular tariff as shown by that schedule O. R. C. No. 1 from Oak Grove, Center, Courtney, Milwaukee Heights and Risley is 15¢, and the regular tariff from these different points named as shown by that O. R. C. No. 1 to the station on the city boundary known as Golf Junction is 5¢ less than amounts to terminal at 1st & Alder sts. Now, if passengers from these points see fit to ride first to Golf Junction for the rate 5¢ less than the rate to 1st & Alder sts. and then to become a city passenger from that point in as distinguished from interurban passengers, can they, upon payment of 5¢, secure transfers the same as any other urban passenger as distinguished from interurban passenger?

A. Yes sir.

Q. Now, then, Nickum you have testified, is because of the peculiar physical conditions existing on the Springwater div. between Golf Junction and Nickum, treated for the purposes of your tariffs and your regulations as though it were on the city boundary, is it not?

A. Yes sir.

Q. Now referring to Nickum: Do passengers paying 5¢ at Nickum, do they get a transfer upon request?

A. Yes sir.

Q. Is it within the 5¢ limits?

A. Yes sir.

Q. Referring now to people coming in from Gilbert or Gates: Suppose a passenger got on at Gilbert or Gates going to other points and paying 10¢ to ride to 1st & Alder sts., would they get transfers upon request?

A. No sir.

Q. They would not, did you say?

A. No sir, they wouldn't.

Q. Suppose, instead of doing that, they paid 5¢ to Nickum which the company treats as being on the city boundary and then paying 5¢, would they then get transfers?

A. Yes sir.

Q. Does the same thing apply to all these points beyond Gilbert and Gates on the Springwater div.?

A. Yes sir.

Q. The fare is 5¢ less than to Portland, is it not?

A. Yes sir.

206 Q. And referring to Nickum, which is treated as the city boundary, he could become a city passenger and secure transfer the same as any other city passenger by paying 5¢ fare, could he not?

A. Yes sir.

Q. Now then, taking the reverse of that situation, suppose a man is out on Willamette Heights or down to St. Johns and he wants to go to Oregon City, how much would it cost him to ride from St. Johns to Golf Junction?

A. Five cents.

Q. And he would get a transfer then from St. Johns car to the Oregon City car or any other car going to Golf Junction, would he not?

A. Yes sir.

Q. Then, having arrived at Golf Junction for five cents, how much much would it cost him to ride from there to Oregon City?

A. 20¢.

Mr. AITCHISON: I have wasted a lot of nick*les* in my life if that is true.

Mr. MALARKEY: We do all the law requires us to do—we publish and post our schedules with the railroad commission.

Mr. AITCHISON: Do you contend that you have filed with the railroad commission any regulations as to these transfers?

Mr. MALARKEY: I do not know that the city business is necessary to be filed with the railroad commission.

when given city transfers?

Mr. MALARKEY: I contend it is by virtue of this condition which is known.

Mr. AITCHISON: Do you not think you ought to file passenger tariffs for this travel from Lents and the larger points outside the city of Portland?

Mr. MALARKEY: Well, there is no question but what that is generally known.

Mr. AITCHISON: You are objecting that I had no knowledge of this because I was presumed to know——

Mr. MALARKEY (interrupting): The only thing the law requires us to do is to post our schedules and I want to say right here that the company——

Mr. AITCHISON (interrupting): We had better proceed with the case.

Mr. MALARKEY: Let me ask you this question: Now, on the other

hand, referring to the cars that are engaged in strictly city
207 business on the lines of the Portland Railway Light and Power Company, as, for instance, the 23d street line, the Sixteenth st. line, the Portland Heights line, the Upper and Lower Albina lines and many other lines of that character: Do the conductors on those lines have anything to do other than collect 5¢ fares?

A. No, sir.

Q. Are they equipped or in any — provided for the collection of other than five cent fares?

A. No, sir.

Q. Are they supplied with tickets from Portland to all the stations on the interurban lines?

A. No, sir.

Q. The Portland Railway Light and Power Company operates interurban lines over its Springwater div., from its Oregon City div. and also I think over a division now known as the Troutdale div., does it not?

A. Yes, sir.

Q. And have one way and round trip rates from Portland over its various divisions—these various interurban lines—there is a long schedule of fares, is there not?

A. Yes, sir.

Q. Would it be practicable, Mr. Mulchay, in the operation of the urban system, that is, the city lines as distinguished from the interurban lines, to provide every conductor on every street car engaged in urban business with the necessary information and authority to collect fare direct to the stations on these interurban lines?

A. No, sir.

Q. For instance, let me ask you how many street cars engaged in purely urban business as distinguished from interurban business are being operated each day by the Portland Railway Light and Power Company and the Portland Railway Company together, or do you know?

A. I do not know.

Q. Can you approximate the number?

A. Do you mean on all their lines?

Q. Excluding those engaged in the interurban business and the Oregon City div.—excluding them?

A. Well, there is about—on the Oregon Water Power city lines—about 35 cars I think in the city.

Q. Then how many on the Portland Railway Company's city lines?

208 A. I could not give you even an approximate figure on that. I am not familiar with the Portland Railway Company's lines.

Q. You are not connected with them, do you mean?

A. I am not familiar with them.

Mr. MALARKEY: Now assuming—Mr. Fuller says there are 210 approximately—the average number of cars in use on the Portland

Railway Company's lines. Assuming then 210 cars running on the urban or city lines of the Portland Railway Company and about 35 cars on the city lines of the Oregon Water Power, which is now the Portland Railway Light and Power Company, that would make about 245 cars engaged in urban business as distinguished from interurban business, and leaving out the question of extra men,—how many regular conductors does it take to run a car in the course of one day?

A. It requires two conductors to run a car during the course of one day.

Q. Then leaving out the question of extra men and all that, to operate these 245 cars engaged in urban business requires 490 conductors, does it not?

A. Yes, sir.

Q. Then if this interurban business was to be handled so that a person could get on a Willamette Heights car and pay their transportation and get a transfer to Oregon City for 25¢, and the same system was to be applied to all the city cars, it would necessitate all the conductors employed upon all the cars being fully informed and advised about all the regulations and fares concerned in interurban business, would it not?

A. Yes, sir.

Q. Is that practicable?

A. No, sir.

Q. Though a passenger upon getting on a car at Willamette Heights and riding to Golf Junction for 5¢, there are no regulations by which the conductor on the Willamette Heights cars can take 25¢ to Oregon City and give a transfer or take 80¢ for a ride to Cazadero and give a transfer and do those things?

A. No, sir.

Q. You said it would be impracticable and inconvenient to
209 do that because of the necessity of having all of the employés —all this great army of strictly city conductors—informed of all these things? What about the importance of time in handling those large sums of money, would that be an element that would interfere with the operation of the city business?

A. That would be a very important one.

Q. Now, how many different kinds and styles of tickets and transportation are in use on the Springwater and Oregon City divisions of the Portland Railway Light and Power Company?

A. Somewhere in the neighborhood of between *forth* and fifty different forms.

Q. That is to say their interurban business as distinguished from the urban business as conducted on the Oregon City div., the Springwater div., the Troutdale div. and the other interurban business necessitates that they have in use some *forth* or fifty different forms of transportation, is that what you mean?

A. Yes, sir, tickets.

Q. And if a transfer system between interurban business and urban business were to be established it would necessitate every conductor on every city line having to pass upon all these different

forms and handle all these different forms of transportation, would it not?

A. Yes, sir.

Q. And that would make every one of them a railroad conductor as distinguished from a railway conductor in handling 5¢ fares, would it not?

A. Yes, sir.

Q. And yet, with things as they are, people can ride and keep themselves city passengers until they get to the city limits and then become an interurban passenger if they choose instead of making themselves interurban passengers at First & Alder sts.?

A. Yes, sir.

Mr. AITCHISON: Do you think that is at all reprehensible if they do that?

A. No, sir, I do not.

Mr. MALARKEY: Now, Mr. Mulchay, I will ask you if you can give a comparative estimate of the amount of traffic on the St. Johns line between Portland and St. Johns and the amount of traffic on the Oregon City div. between Portland and the following stations taken together: Milwaukee Heights, Courtney, Oak
210 Grove, Center and Risley, as to the number of passengers carried? How many passengers ride from Portland to St. Johns and from St. Johns to Portland on the St. Johns div. as compared with the number of passengers that ride from Portland to stations on the Oregon City div. to stations named or vice versa?

A. I do not know except approximately. There is a great deal of difference in favor of the St. Johns line but I do not know how great.

Q. Is it two to one in favor of the St. Johns line, do you think?

A. Greater than that.

Q. Is it ten to one in favor of the St. Johns line, do you think?

A. Yes, sir, I believe it would be.

Q. Are you sure it would be as much as ten to one in favor of the St. Johns line?

A. Yes, sir.

Q. That is to say, that at least ten people ride to and from St. Johns as do on the Oregon City line from all these stations together—to and from all these stations referred to, do you?

A. Yes, sir.

Q. Are you, Mr. Mulchay—have you ever been down to Los Angeles?

A. No, sir.

Q. Do you know whether or not they have a very extensive interurban electric system down there?

A. Yes, sir.

Q. Do you know what fares are charged on the electric system down there from examination of the schedules?

A. I have a number of their schedules; yes, sir.

Q. Will you please produce them?

A. (Witness produces a number of schedules which are introduced in evidence and marked Exhibit 11 by defendant.)

Q. I will ask you if these are schedules showing the rates of fare charged on the Los Angeles interurban electric system, and if this letter attached thereto is the letter received by Mr. Fuller in response to a request for information on the subject?

Mr. WRIGHT: I object to that question but not to the schedule. He asked him if that was a letter received by Mr. Fuller.

211 WITNESS: It was the letter received by Mr. Fuller.

Mr. MALARKEY: They are offered in evidence and marked Exhibits 12 to 18.

Mr. WRIGHT: Plaintiff objects to exhibits 12 to 18 consisting of schedules of Los Angeles lines as being incompetent, immaterial and irrelevant.

Mr. MALARKEY: We would like to have it understood, Mr. Aitchison, that in offering these we would like to be able to withdraw them as they are the only copies we have, after they have served the purpose of this case.

Mr. AITCHISON: The only point is that if there is an action brought under section 32 we have to certify to these and use them for future cases. If you cannot get copies we may be able to return them.

Mr. MALARKEY: Do you know, Mr. Mulchay, what are the passenger fares charged by the Southern Pacific Company between Portland and Oregon City?

A. The rate is 50¢ between those points on the Southern Pacific.

Q. Did you say the rate is 50¢ between Portland and Oregon City on the Southern Pacific?

A. Yes, sir.

Q. That is the one way cash fare, is it?

A. Yes, sir.

Mr. AITCHISON: What is the distance?

A. Fifteen miles.

Mr. MALARKEY: Did you say 50¢ from Portland to Oregon City?

A. Yes, sir.

Q. That is the same ride that the defendant here charges 25¢ for, is it not?

A. Yes, sir, exactly.

Q. What are the fares from Portland on the Southern Pacific Company's line to intermediate points between Portland and Oregon City?

Q. They have four stops between Portland and Oregon City. First stop is Car shops, distance 3 miles, 15¢; Willsburg, distance 5 miles, 20¢; Milwaukee, distance 7 miles, 25¢; Clackamas, distance 11 miles, 40¢. All these rides are named in O. S. C. No. 31. I think that is the Oregon Railroad Commission number. I suppose it was intended for "O. R. C."

Mr. AITCHISON: What is the Interstate Commerce Commission's number?

A. 1105.

Mr. AITCHISON: Does the Southern Pacific Company attempt to compete with you?

A. They did up until recently, until the time of publishing this tariff.

212 Mr. AITCHISON: Do they compete with you now. Do you not know that they put this tariff into effect for the purpose of going out of competition with you?

A. The way I understood it—they said it was in order to give a through rate to Portland.

Mr. AITCHISON: They have repeatedly stated to us that they are unable to compete with electric lines for either freight or passenger traffic.

A. They have done it up to August 24th.

Cross-examined by Mr. WRIGHT:

Q. Mr. Mulchay, what is the capacity of the cars that you run on these Oregon City and Springwater divisions?

A. The regular cars on these divisions are 56 in capacity.

Q. Do they all have that capacity?

A. All regular cars do. Occasionally owing to breakdowns, due to defects generally, they put on smaller cars for a trip or two.

Q. These figures are for passengers furnished seats, are they?

A. That is the seating capacity.

Q. When you run cars containing 56 passengers, for which you built them, on any of these lines and they are run full, do those cars pay you?

A. Well, I never saw the statistics on it, but I presume they do.

Mr. MALARKEY: Do you know anything about that part of the business?

A. No, sir.

Mr. WRIGHT: When were these tariffs made which you filed with the commission—when were the rates first established?

A. Ever since I have been with the company, that is for the last four years.

Q. The same rates have been applied for the last four years, have they?

A. Yes, sir, about four years.

Q. Now, did you have anything to do with the making of these rates originally?

A. No, sir, they were all established before I came to the company.

Q. They were already established when you came to the company, were they?

A. Yes, sir.

213 Q. Now on these sheets which the defendant issued did you carry passengers from Portland to Jenne, which is 14.43 miles for 15¢? Do you know whether that rate was based upon running cars seating 56 passengers each?

A. No sir, I do not believe the seating capacity was considered.

Q. You think that was not considered, do you?

A. When the line was originally opened they had a smaller seating capacity.

Q. You think the cars had a smaller seating capacity then than now?

A. I believe there was a slight difference, perhaps 44 to 48.

Q. Then, in your opinion, this rate of 15¢ for 14.43 miles was bases upon running cars at that time which only seated 48 passengers?

A. When the line was originally established there were trailers attached to a locomotive—when originally opened.

Q. On the Oregon City div. you run the same kind of cars, do you not?

A. They have the same seating capacity.

Q. And the seating capacity has been the same for the last four years, has it not?

A. Yes sir, about the same.

Q. And you also run the same cars out to Lents as to seating capacity, do you not?

A. Sometime, from 44 to 56.

Q. You run no cars of greater seating capacity than 56, do you?

A. No sir, that is the largest we have.

Q. Now, in making a rate of 15¢ on your Oregon City div. your limit is 9.26 miles for 15¢ and you are running cars on both lines with the same seating capacity. Now can you explain to the commission wherein there is a difference in establishing these schedules for a greater rate on one division, as to whether there is other difference or whether the difference is as to mileage alone.

A. I believe that was due to an understanding at the time the line was opened to Gresham. I do not know whether there was a written agreement or not. The line had to secure right of way, I believe, and station facilities and it was due to that that Gresham was to receive the benefit of the same rate to Gresham as to Oregon City—the 25¢ rate the same as Oregon City receives.

214

Mr. MALARKEY: Were you connected with the company when these arrangements that you say you "think about" were made?

A. No sir, I was not.

Mr. MALARKEY: Well, I shall object to Mr. Wright cross examining Mr. Mulchay about anything he has not been asked to testify to.

Mr. AITCHISON: You went into the reasonableness of the rates.

Mr. MALARKEY: He does not speak for that—the tariffs speak for themselves. He was not asked about that. He does not pretend to know about the cost of operating a car, as to whether seating capacity pays.

Mr. AITCHISON: You asked him all about the Portland Railway Company and the amount of business on the St. Johns line.

Mr. MALARKEY: Yes sir, that is true, but does that entitle them to cross examine him about things which occurred before he came with the company?

Mr. AITCHISON: He surely should not be asked to testify to anything except what he knows.

Mr. WRIGHT: He is here as an expert and I asked him why those rates are fixed in that way.

Mr. MALARKEY: I shall insist upon my objections because you have no right to ask those questions about something he does not know anything about. I will make my objections.

Mr. AITCHISON: What is your objection—that it is an improper cross examination? I have been unable to find any rule in an investigation of this sort that the commission is bound by the strict rules that would govern a court.

Mr. MALARKEY: They certainly cannot cross examine him about facts he does not know anything about.

Mr. WRIGHT: You spoke about them riding out to Gilbert.

Mr. MALARKEY: Well, go ahead and ask him questions. I will withdraw the objection.

Mr. WRIGHT: Have you looked up the old tariffs and arrangements that were made before your time with regard to these matters?

A. No sir.

215 Q. You are the traffic manager of this corporation, are you not?

A. I am the traffic agent; yes sir.

Q. And as such officer of the company what records and matters, data and statistics do you have in your charge?

A. I have no statistics that would furnish the information as to any rate—as to why they were established and how they were established.

Q. You are now traffic manager, are you not?

A. I am traffic agent; yes sir.

Q. If these rates were to be changed in any respect by the company at the present time who would be the one to make up the new schedules for any changes?

A. I would make them up.

Q. And those rates, I take it, would be, of course, submitted to the management but you would be the one to work them out, would you not?

A. Yes sir.

Q. If you were to do that, or if you were called upon by the officers of your company to inform them as to whether the commission was making a proper and just order for a change of rate, where would you go for information?

A. Well, I presume I would look and see if the business at the present time was paying at the present rates—about the first thing I would do.

Q. Is it not a fact, Mr. Mulchay, that you are running the same class of cars as to seating capacity on your Springwater div. out as far as Jenne and out as far as Center on the Oregon City div.?

A. They are the same style of cars and the same seating capacity, about.

Q. And on the one line you charge 15¢ and collect that fare from all passengers who ride from Jenne to Portland, do you not?

A. Same fare?

Q. You collect 15¢ from Jenne to Portland, do you not?

A. Yes sir.

Q. And from Center, Oak Grove and Courtney you would demand and collect from all passengers 15¢ to Portland, do you not?

A. Yes sir.

216 Q. And from Portland out to either place, you would collect the same fare, would you not?

A. Yes sir.

Q. Now, you have stated in your examination that the company has a practise of furnishing transfers to passengers who ride in from Portland—ride in from Oak Grove or Center or Courtney to Portland—if they pay 10¢ to Golf Junction and then pay the conductor another 5¢ thereafter, that is correct, is it?

A. Yes sir; after arrival at Golf Junction.

Q. If the passenger pays that he pays 15¢ just the same to the company, does he not?

A. Yes sir.

Q. As though he had paid to ride clear through to Alder St., does he not?

A. Yes sir.

Q. But the difference is that when he rides to Golf Junction he then gets another slip form which entitles him to ride on some other city line such as the Portland Heights, does he?

A. Upon the payment of an additional fare, he does.

Q. He gets a transfer, does he not?

A. Yes sir.

Q. The company has been, at all times they have had schedules in force, willing to transport (Wright's letter 11-27-07) passengers for 15¢ to Portland Heights or St. Johns, have they not?

A. Yes sir, we have carried—that is, upon the payment of a ten-cent rate to Golf Junction and passengers desiring transfers into the city pay an additional 5¢ into the city.

Q. The company is willing to transport (Wright's letter 11-27-07) passengers from Oak Grove, Center and Courtney to Portland or any other of these places which are mentioned in our complaint, which I take it you have read, have you not?

A. No sir.

Q. Just look at these places in the complaint on page 4 beginning with Portland Heights in that paragraph. Your company, at all times it has had these rates in effect, has been willing, has it not, to transport passengers from Oak Grove, Courtney and Center through to those places stated there for 15¢ provided they got this fare paid in those two amounts?

A. Yes sir.

217 Q. Has there ever been any bill, or circular, or notice of any kind put out by the company either posted on its station, or in the hands of conductors, or in the cars where the public could see it notifying them they could ride in this manner?

A. Our tariff specified it, that is all.

Mr. AITCHISON: Do you mean tariffs specify that transfer will be given?

A. No sir, specify rate of fare.

Mr. WRIGHT: But is it posted anywhere that transfer can be had by payment of those fares to Golf Junction?

A. Conductors have instructions to issue transfers. No, only with exception of conductors.

Q. Are the conductors instructed to inform the public every time they pay a fare from Oak Grove, Courtney and Center that if they pay to Golf Links, 10¢, that they can then get this transfer to the city limits by paying the other 5¢?

A. No sir.

Q. Do you know whether, as a matter of fact, that they do so inform the public?

A. I do not know.

Q. Now, if the company is willing, as you have just stated, to transport passengers for 15¢ through in the manner you say, can you explain why they do not either make the schedule directly to so state or else inform the public of it?

A. Why that is what we endeavor to do when we publish the tariff—to specify the rate into Portland, that is, from Portland to Gilf Junction, and rates beyond.

Q. You do not quite get my question: I asked, you having now stated that the company is willing to transport passengers for this price through to any of those points mentioned in the complaint, or to St. Johns, for 15¢, why does not the company either put that plainly in its schedule that these through fares and the transfers are given or else post notices that the public may know about it generally without having to refer to schedules?

A. Well, because it was not required of them to publish
218 them other than in the manner we have published them.

Mr. AITCHISON: These transfers are issued from Lents and Nickum, are they not, to points on the line of the Portland Railway Company?

A. Yes sir.

Q. Both Lents and Nickum are outside of the city, are they not?

A. Yes sir.

Q. These transfers are good on the East Ankeny line to Rose City Park, are they not?

A. Yes sir.

Q. That is outside of the city of Portland, is it not?

A. Yes sir.

Q. They are good to the 5¢ fare limit on the Vancouver line, are they not?

A. Yes sir.

Q. And may they be used in conjunction with 5¢ fare to Vancouver?

A. Yes sir.

Q. And on the Woodstock or Waverly-Richmond lines, may they?

A. Yes sir.

Q. Do not those lines extend outside of the city of Portland?

A. Woodstock and Vancouver lines do.

Mr. WRIGHT: A great deal was asked you about the trouble con-

ductors would have in making the tickets to these outside points. If the fare to Oak Grove, Courtney and Center was reduced either to ten cents or five cents to First and Alder sts. would it not be just as practicable to give transfers from those divisions on what is known as the old O. W. P. lines to the Portland Railway Company's lines as it is now?

A. No, we would have to use the same system as we do at the present time.

Q. State what that system is.

A. Collect through fare and issue what we usually term outside or city limits duplicate ticket.

Q. Supposing, instead of following this practise which has developed in this examination of charging the fare to Golf Junction from Oak Grove, Courtney and Center and then an additional fare from Golf Junction in upon which you give a transfer, you change the practise of the railroad and issue to your Oak Grove and
219 vicinity passenger a 15¢ ticket which entitle- him to a transfer, would it not then be just as practicable for the conductors on both systems to transact their business as it is now under your present system?

A. We do not issue a 15¢——

Q. I am not asking you that—I am asking you how it would be if you did?

(Question read to the witness.)

A. No sir.

Q. Why would it not?

A. Because that would be as I stated before—the conductors on the city lines would have to be supplied with necessary tickets in order to handle the interurban business.

Q. Now let us get down to this thing straight. I want you to understand it plainly and I want to be fair with you. I just told you and called your attention to the practise of getting those transfers. Now, suppose you had in place of that a 15¢ flat ticket to get in from Oak Grove, Center and Courtney and that ticket entitled the passenger to a city transfer instead of the way you run it now, would you then have any more difficulty in transacting the business of the Portland Railway Company and the Portland Railway Light and Power Company than you do now?

Mr. MALARKEY: He answered that question.

Mr. AITCHISON: Answer it again then.

Mr. WRIGHT: I want to be fair with the witness.

Mr. MALARKEY: You do not want to be fair, you asked him about the 15¢ fare from Oak Grove to Portland.

Mr. WRIGHT: Those very passengers are going in now on 15¢ fare.

A. We could issue a 15¢ ticket which would entitle a passenger to a transfer to a city line.

Q. Would there be any more difficulty in handling that way?

A. No sir, they could be handled going in that way.

Mr. AITCHISON: Would there be any difficulty in going out in a

conductor upon being tendered 15¢ saying "No, I will take
220 5¢ and you can pay 10¢ at the city limits going out? Would there be any difficulty in that sort of practise?

A. Well, there would be difficulty when it comes to a ticket.

Mr. A.: I am not talking about a ticket—cash fare. The conductors could tell the passengers, could he not, "I will take 5¢ and give you a transfer on the O. W. P. line which will take you to the city limits"?

A. That would be impracticable during the business hours of travel.

Mr. A.: You think it would be impracticable for him to pay a nickle, do you?

A. It would be impracticable for the conductor to tell each particular passenger.

Mr. A.: You think that is impracticable, do you?

A. Yes sir.

Mr. WRIGHT: When you give transfers now to any of the city lines, do not the passengers soon learn the system and ask for them all right?

A. Yes sir, they do.

Q. There is no trouble about it, is there?

A. No sir.

Q. And now going the other way, suppose you adopted a system of giving your general transfers to the O. W. P. by the Portland Railway conductors and it was left entirely to the old O. W. P. line conductor to take that transfer and collect the balance of the fare whatever your rate might be out to Oak Grove, Center or Courtney, would there then be any trouble about the city street car conductors carrying on that business?

A. No sir.

Mr. MALARKEY: That is the way we do it now under the present system.

Mr. WRIGHT: Do you know any reason why the company does not want to put up notices informing the public of these transfers that will enable them to go from Portland Heights or St. Johns out to Oak Grove, Courtney and Center for 15¢?

A. I do not believe the notices are published within the city—they are on the cars.

Q. Are there notices on the cars informing them that they can ride out to Oak Grove, Courtney and Center providing they get a transfer to Golf Junction? Is there any reason why the company
221 does not want to make it publicly known that such is the case by posting notices outside of these schedules that you file with the commission?

A. None that I know of.

Q. Is it not a fact that the public really never does see these schedules?

A. They are open to inspection at all times.

Q. Is it not a fact that these schedules which are filed with the railroad commission never are in prominent places where the public can easily see them?

Mr. MALARKEY: They are in the hands of the Railroad Commission.

Mr. AITCHISON: I might say for your information that we went along the line to see if they were posted and they were on file and could be inspected.

Mr. WRIGHT: There is no notice or paragraph or anything on these schedules especially calling the public's attention to this matter of transfers which they can get if they want to go out there, is there?

WITNESS: No sir, there is not.

Mr. AITCHISON: On the Vancouver line you collect the fare in three chunks, do you not?

A. Yes sir, zones.

Mr. A.: Would it not be practicable, for example, on the Oregon City and Springwater divisions to collect fare to the city limits and have the conductor re-set his register and collect from the city limits in?

A. That is, you mean to collect fare to Golf Junction and re-set his register from there in? That could be done.

Mr. A.: Then conductor could issue transfer to anybody and everybody could pay in two chunks or two zones, could they not?

A. Yes sir.

Mr. A.: Would that work a hardship upon the conductors?

A. It would work a hardship upon the company.

Mr. A.: Do you mean out on the Vancouver line?

A. No sir.

Mr. A.: That prevents fares being overlooked, does it not?

A. We have a hat checking system as far as Golf Junction.

Mr. A.: What is the density of traffic on the Springwater div. as compared with the Oregon City div.?

222 A. The distance is greater.

Mr. A.: Distance has nothing to do with density.

A. There is more opportunity for greater traffic.

Mr. A.: On which line?

A. On the Springwater line.

Mr. A.: Has the density increased or decreased on either of those lines in the last two years?

A. They are proportionately equal.

Mr. A.: You think they are proportionately equal, do you?

A. I think as to density they are proportionately equal.

Mr. A.: Do you consider the density at all in making rates?

A. Yes sir, in making a change of rates.

Mr. WRIGHT: Do you refer to the amount of passenger traffic?

Mr. AITCHISON: Number of passengers; yes sir.

Mr. WRIGHT: Something has been said about there being impracticability in charging less than 5¢ fares; Have you ever eaten lunch at the "Cafetera"?

A. No sir.

Mr. W.: I would like to invite you up there if you have not. Do

you object to investigating the system they have there of using copper coins?

A. I would be glad to investigate it.

Q. Do you know that the United States Government has copper coins for use in making change?

Mr. AITCHISON: I suppose that is pretty well within the knowledge of this commission.

Mr. WRIGHT: I presume it is not a matter of your judicial knowledge.

Q. Would it not be possible, Mr. Mulchay, to issue change in pennies if you choose to do so or in some kind of slips that would be so many of them bought at such a price, fares less than 5¢ multiples.

A. No sir, it would be almost impossible at some hours of the day.

Q. Do you not think you could devise slips of some kind which could be used for fares at different figures?

223 A. No sir, I don't think we could that would be satisfactory.

Q. You issue tickets now that call for 5¢ multiples, do you not?

A. We do, yes sir.

Q. And you could issue slips in place of cash fare charges that would cover the same thing if a man wanted to buy two, three, four or five of them, could you not?

Mr. MALARKEY: We do now if a man wants to.

Mr. WRIGHT: I refer now to the cash fare figures 15¢. Suppose it were 12¢ to the same point, could you not issue two tickets for 12¢ each and give the man 1¢ change? Could you do it?

A. We could.

Q. Could the conductor do it?

A. Not very well if the traffic were heavy.

Q. I refer now to your lines running outward to those points spoken of on the old O. W. P. line alone—not city lines?

A. The same conditions exist there.

Q. Is it not a fact that radiating out from the city of Portland in all directions that these lines run there is a limit beyond which what might be called suburban business does not go?

A. I do not think I understand your question.

Q. I will re-state it: Take your lines running out from Portland to St. Johns, to Lents, to Oak Grove, Courtney and Center, is there not a limit all around the circumference of the city of Portland beyond which purely suburban business does not travel?

A. That is, use the company's lines as a matter of transportation?

Q. No, I mean by "suburban business" the people who ride in and out of Portland upon your lines, practically daily—referring to that class of business, is there not always a limit out on your lines beyond which that class of business does not travel? Do you not understand yet?

Mr. AITCHISON: The point is, the man who travels daily on your line—works in Portland and lives in the country—do not go out farther than a certain distance from the center of population
224 and be a commuter or suburban; beyond that he is a small farmer.

A. Well, yes sir, some locations.

Mr. WRIGHT: I want to ask you as a traffic man if it is not a fact that as you go outward on your lines towards Cazadero, towards Oregon City or towards St. Johns there is always a limit somewhere—a mileage limit—on those lines beyond which this purely suburban business does not travel. Is that not a fact?

A. Yes sir, that is right.

Q. Now, is it not a fact that there is suburban business out as far as Oak Grove, Center and Courtney?

A. Yes sir, suburban, I presume.

Q. And there is suburban business to Lents, is there not?

A. Yes sir.

Q. Do they travel out as far as Gilbert suburban?

A. Yes sir.

Q. As far as Jenne, do they?

A. There is little if any to Jenne; I do not think there is.

Q. As far out as Sycamore, do you think?

A. Wilson would be the limit of suburban business on that line.

Q. You would say that Wilson would be the limit of suburban business on that line, would you?

A. Yes sir.

Mr. WRIGHT: I think I am through with the witness.

Re-examined by Mr. MALARKEY:

Q. Counsel asked you about the posting of notices advising the people on the Oregon City div. that they can pay fare to Golf Junction. You say there is no objection as far as you know to the posting of such notices.

A. Yes sir, that is correct.

Q. Now as a matter of fact these tariffs are posted and the information given as required by the law of the Oregon Railroad Commission, are they not?

A. Yes sir.

Q. And there is no effort made by the company or anyone to hide the information is there?

A. No sir.

225 Q. At any other point in the city—are the notices posted any more conspicuously on the cars coming from Willamette Heights that a person can transfer to South Portland than on the Oregon City cars going toward Golf Junction?

A. No sir.

Q. As a matter of fact there has been published in the various papers in the city of Portland the points at which transfers can be obtained on the lines of the Portland Railway Company and the Portland Railway Light and Power Company, has there not?

A. Yes sir.

Q. Do you not know, as a matter of fact, that your conductors have told passengers that they cannot have a transfer—to tell them they could not get it in that way, do you not know that?

A. They have done it.

Mr. AITCHISON: I handed the conductor a quarter on the Oregon City car and was told I was not entitled to a transfer.

Mr. MALARKEY: Did you offer him 20¢ to ride to Golf Junction?

Mr. AITCHISON: I did not.

Mr. AITCHISON: How about the man at Lents——

Mr. MALARKEY: If this commission thinks they are going to abrogate that contract they are going to have——

Mr. AITCHISON (interrupting): Do you contend that the regulations as to the issuance of transfers to all points outside of the city are covered solely by tariffs on file with us? Are there no others than those—are all the regulations as to the issuance of transfers covered by tariffs on file with us?

Mr. MALARKEY: The question before us is the question on this Oregon City div. I expect when I try a case I am trying it before the commission. The commissioner has been talking about his own personal experiences. I will ask the commissioner, so that our claim will be understood, we say to you that "there is our tariff and it says the rate from Oregon City to Golf Junction is 20¢." And, when you get to Golf Junction you are just the same as a city passenger and can get a transfer. Now then, of course,
226 if you got on a car and wanted to pay 25¢ when you got on at the—of course the conductor may have told you he could not issue one but he could. I will say right now that if this commission thinks that posting of notices will help out the situation any we have no objection to posting such notices.

Mr. AITCHISON: Do you not think that would conduce to a better feeling all around?

Mr. MALARKEY: I do not know.

Mr. WEST: Referring to the Los Angeles tariff sheets, Exhibits Nos. 12, 13, 14, 15, 16, 17 and 18: Do they cover the whole system of the Los Angeles Railway Company?

WITNESS: I do not know whether that covers the entire system.

Mr. WEST: Were they selected from those sent you by the Los Angeles people?

A. Those are some of the tariffs on file in the office.

Mr. AITCHISON: Are those all you have of that system?

Mr. WEST: What I am getting at is, are these selected for this particular purpose?

A. They have two or three systems down there and I do not know which those are.

Mr. MALARKEY: The commutation rates are not shown in here but if you want them I will send them to you.

Mr. M.: I supposed you wanted to see the things referring to cash fares. If you want those I will send them to you.

Mr. WRIGHT: I would like to ask Mr. Mulchay another queston. In the matter of these transfers now, if a passenger out on

the Springwater line traveling from Gilbert towards Portland, is his fare demanded of him by the conductor and when he is told that the fare is 10¢ and the passenger asks for a transfer, does the conductor tell him immediately "we cannot issue one" or does he tell the passenger "if you pay this fare in two installments you can get a transfer? What is the fact.

A. No, I do not think he does.

227 Q. Suppose a passenger says "I want a transfer", does the conductor promptly tell the passenger if he pays in two installments he can have one?

A. He has no instructions to that effect but I do not know whether he does or not.

Q. Out on the Oregon City div. if a passenger traveling in from Oak Grove asks what the fare is and is told 15¢ and says "I want a transfer", does the conductor tell him "You cannot have one" or does he say "You pay to Golf Junction and then pay another fare"?

A. That is something I do not know. They have no instructions to do so but they may do so.

Q. As a matter of fact does the conductor not tell him "You cannot have one."?

A. He probably does.

Q. I am speaking of transfers—does the conductor not tell him "You cannot have one."?

A. If he pays full fare he does not issue transfer.

Q. Does he go further and explain as to the other practise you have?

A. I do not think he does.

Mr. MALARKEY: Is there any discrimination by the company so far as you are advised concerning issuance of transfers to passengers on Springwater and Oregon City divisions?

A. No sir.

Q. Is it a practise to explain to passengers on the Springwater div. that they can get a transfer to Nickum? And is the fact concealed from any passenger?

A. No sir.

Q. There is no effort on the part of the company to make any discrimination, is there?

A. No sir, not at all.

Mr. WRIGHT: Is the business you speak of as being ten to one in favor of St. Johns, is that business out there at St. Johns suburban business?

A. It is considered city business.

Q. They come in from there to the city to do business, the people out there just the same as Oak Grove, do they?

A. The only difference between the two is, there is a great

228 deal of intermediate business on the St. Johns line.

Q. Is there not quite a large suburban business on the line as conducted between St. Johns and Portland?

A. Yes sir.

Mr. MALARKEY: Of course I think the commission understands this, but this all comes to this: Questions asked you by Mr.

Wright—do you mean to have the commission believe that the kind of business it conducts is inter-urban and is in the same sense inter-urban and of the same character as the Oregon City and Cazadero divisions? Is it not a matter of fact that it is not a subu*b*an business between Portland and St. Johns? Is it not a fact, Mr. Mulchay, that there are many people in business and have places of business in St. Johns that live in Portland?

A. Yes sir, I presume there are.

Q. And whose business are carried back and forth right along, is that not a fact?

A. Yes sir.

Q. And how about the dry dock out there, people going to and from Portland, which line do they use?

A. St. Johns line.

Q. And these passengers going between Portland and St. Johns—quite a manufacturing place, is it not?

A. Yes sir.

Q. And these iron works and tile works—do they not some of them live in Portland, various parts of the city of Portland?

A. Yes sir.

Mr. WRIGHT: I want to introduce a brief question here to Mr. Risley who has already been sworn, and I want to know whether you will also stipulate that the Portland Railway Company runs an inter-urban line between Portland and St. Johns?

Mr. AITCHISON: The character of that line has been shown clearly.

Mr. WRIGHT: I wish to offer the Annual Report of the Portland Railway Company filed with the Railroad Commission in evidence.

Mr. MALARKEY: Where is it?

Mr. WRIGHT: Right here I believe. There it is. I wish merely to show that they are filing the report with the Railroad Commission and I desire to offer it in evidence.

229 Mr. MALARKEY: I suppose I ought to object to this, that if, upon a rehearing of this case and this whole record has to be taken up, they cannot review you for excluding testimony. I object to these because it would make an unnecessarily large record if it had to be taken up.

Mr. AITCHISON: The commission will take notice that the Portland Railway Company has that report filed with it for the year 1907.

JOHN F. RISLEY—Re-examined.

Examined by Mr. WRIGHT:

Q. Mr. Risley did you attempt to ride from Gilbert into Portland over the lines of the defendant company at any time?

A. I did.

Q. When was that?

A. A year ago last March.

Q. You asked the conductor when you paid your fare for a transfer, did you?

A. I did.

Q. What did he say the fare was?

Mr. MALARKEY: I object to this because it was before the Portland Railway Light and Power Company owned this line and is foreign to anything before this case. We had no control over what some previous company told their conductor to do.

Mr. WRIGHT: If that is correct, that this was before, but I supposed that was the same concern. If necessary I would like to call Mr. Johnson as a witness.

Mr. WRIGHT: Now, as to any rebuttal testimony, I do not know of anything at this time. I wish to consult Mr. Paget and if he wishes to put in anything more I will so notify you right away, but, if not, I will consider this case as submitted.

Mr. WRIGHT, Mr. MALARKEY: Agreeable that case be submitted as follows:

Mr. AITCHISON: It is ordered that the plaintiff may have fifteen days from this date in which to file brief and serve the same upon defendant, and the defendant may have twenty days from
230 the time of service of same to answer the brief of plaintiff; and the plaintiff is then to have ten days in which to reply; and that the case will be set down for oral argument after plaintiff's reply by the commission and will then be considered as submitted.

Mr. WRIGHT: Be considered as the order in both the Milwaukee case and this.

Mr. WRIGHT: Unless I notify you to the contrary there will be no further testimony offered by us.

Commission stood adjourned at 12:30 o'clock p. m. October 31, 1907.

231 STATE OF OREGON,
County of Marion, ss:

I, F. Roy Davis, the official stenographer duly appointed by the Railroad Commission of Oregon, do hereby certify that the foregoing is a full, true and correct transcript in longhand of all the testimony, evidence and proceedings had on the above entitled investigation before said commission, carefully compared by me with my original notes thereof taken down by me, and I hereby certify the foregoing to be a correct statement of all the evidence and proceedings had on said investigation, as taken and transcribed by me.

Witness my hand officially, this 22nd day of November, 1907.

F. ROY DAVIS,
Stenographer of Railroad Commission of Oregon.

232 **Ex. 2. C. B. A., C'mm'r.**

This agreement made and entered into this 30th day of April, 1901, by and between the Portland, Chicago & Mt. Scott Railway Company, a cooporation duly created, organized and existing under the general incorporation laws of the state of Oregon and having

its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the first part, and the Portland City and Oregon Railway Company, a corporation duly created, organized and existing under the general incorporation laws of the state of Oregon, and having its principal office and place of business in the city of Portland, Multnomah County, Oregon, party of the second part; witnesseth:

That the party of the first part hereby contracts and agrees with the party of the second part that it will on or before sixty (60) days from the date hereof sell and convey unto the party of the second part by good and sufficient deeds of conveyance all of the property, real, personal and mixed of the party of the first part including its right-of-way and railway track as well as all other property; said property and all thereof to be sold, conveyed and turned over *the* the said party of the second part as aforesaid free of all claims and incumbrances whatsoever.

In consideration whereof the party of the second part hereby agrees that it will within sixty (60) days from the date hereof at its own expense and cost substantially and fully equip the said line of railway of the party of the first part hereby agreed to be conveyed running from Hawthorne Avenue in the city of Portland, Oregon, and thence in a southeasterly direction to the town of Lents in Multnomah County, with the poles and wires necessary for the transmission of electric power to propel cars from the town of Lents over the said line now owned by the party of the first part
233 hereby contracted to be conveyed and over the lines of railway of the party of the second part to and through the city of Portland, and to receive all benefits of transfer to other lines that exchange transfer privileges now or hereafter with lines operated by said second party; and the said second party agrees that within the said sixty (60) days from the date hereof it will have the said line in operation in connection with the present line of the party of the second part. And the party of the second part further agrees that as a consideration for the said conveyance so to be made by the party of the first part to it of said property hereinbefore mentioned that it, the party of the second part, will operate the said railway between the said points of termini, to-wit, between said town of Lents and that part of the city of Portland west of the Willamette river, and will run through cars thereover and will not make less than twelve trips per day with passenger coach or coaches each way, schedule to be arranged about as follows:—Leave Portland (terminus) every hour from 6:45 A. M. to 6:45 P. M., then 11:15 P. M., and Saturdays and Sundays 9:15 P. M. Leave Lents every hour from 5:55 A. M. to 6:55 P. M., then 1:30 P. M., and Saturdays and Sundays 9:25 P. M.; and the fare from the town of Lents or intermediate points to and through the City of Portland over the lines of the Portland City and Oregon Railway Company shall never exceed five cents (5¢) per passenger for a single continuous trip either way. It is understood that the party of the second part shall not be obligated to run the said number or any cars over said line in the event that it is made impracticable to do

so by reason of strikes, accidents or causes beyond the control of the party of the second part and while such conditions exist.

It is mutually understood and agreed that upon the execution of this contract the party of the second part may take possession and go upon all the property of the party of the first part and may proceed without interruption or hindrance from the part*h* of the
234 first part to make such improvements and changes and to do such work as may be necessary thereupon or thereabout for the purpose of placing said property and railway line in safe condition for operation as stipulated for in this contract; the present line of road to be operated as now laid except where road can be improved by easing curves or doing away with bridge or trestle work.

Provided, and this agreement is upon the express condition that if the said party of the second part shall at any time during the ten
term of [five]* years from the date hereof fail to perform the covenants hereinbefore contained by it to be performed substantially as provided; or shall, during said period, abandon the said road of the party of the first part, or attempt to tear up or remove the same or any part thereof except for necessary repairs or changes in accordance with the spirit of the foregoing agreement, the said party of the second part shall, upon demand of the party of the first part, turn back to said party of the first part all the property that may be conveyed and turned over to said party of the second part by said party of the first part pursuant to this agreement, free from incumbrance and in as good condition as the same may be in when so conveyed.

In witness whereof, the said parties hereto pursuant to resolutions of their respective boards of directors authorizing the same have caused these presents to be executed in duplicate by their respective presidents and secretaries and their corporate seals to be hereunto affixed the day and year first hereinabove written.

PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,
(Signed) By C. G. GAMMANS, *President.*
PORTLAND, CHICAGO & MT. SCOTT RAILWAY CO.,
(Signed) By GEO. A. BRODIE, *Secretary.*

[Seal of Portland, Chicago & Mt. Scott Railway Co.]

PORTLAND CITY AND OREGON RAILWAY CO.,
(Signed) By W. H. BURLBURT, *President.*
PORTLAND CITY AND OREGON RAILWAY CO.,
(Signed) By WM. T. MUIR, *Secretary.*

[Seal of Portland City and Oregon Railway Co.]

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*NOTE.—Ten years inserted by consent. (Signed) Geo. A. Brodie, Sec'y P. C. & Ore. Ry. Co.

235 STATE OF OREGON,
County of Multnomah, ss:

I, C. A. Maney, do hereby certify, that I have compared the foregoing copy of agreement between the Portland, Chicago & Mt. Scott Railway Company and the Portland City and Oregon Railway Company, with the original thereof, and the same is a true and correct copy of the same and of the whole thereof.

In witness whereof, I have hereunto set my hand and notarial seal on this 29th day of October, 1907.

[SEAL.] C. A. MANEY,
Notary Public for Oregon.

236 Endorsed: No. 133. Certified copy agreement between Portland, Chicago & Mt. Scott Ry. and Portland City & Oregon Ry.

237 Before the Railroad Commission of Oregon.

No. 94.

THE OAK GROVE IMPROVEMENT ASSOCIATION, *by* B. LEE PAGET, as Relator, Plaintiff,

v.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Defendant.

We hereby certify that the foregoing and annexed are the original exhibits introduced in evidence upon the hearing and investigation of the above entitled matter.

Dated at Salem, Oregon, this 11th day of March, 1908.

RAILROAD COMMISSION OF OREGON.
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

[Seal of R. R. Commission of Oregon.]

Attest:

E. G. MILLER,
Acting Secretary.

238 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from the Circuit Court for Marion County.

Hon. William Galloway, Judge.

Argued and submitted November 23, 1909.
Frederick V. Holman and Franklin T. Griffith, for Appellant.
A. M. Crawford and R. R. Giltner, for Respondent.
Moore, C. J.
Affirmed.

* * * * * * *

(Endorsed:) Filed Dec. 21, 1909, J. C. Moreland, Clerk. By ——— ———, Deputy.

239 MOORE, *C. J.*:

This is an appeal by the plaintiff from a decree confirming an order made by the defendant upon the complaint of B. Lee Paget and others, members of a voluntary association, commanding the plaintiff to desist from charging or collecting a fare of 15 cents for the transportation of any passenger on the Oregon City division between Portland and Milwaukee Heights, Courtney, Oak Grove, Center and Risley, which stations are collectively called the Oak Grove district, and not to demand or receive more than 10 cents for such service, and also to give to passengers between all stations in that district and Portland the same transfer privileges that the plaintiff grants to persons carried by it to that city on the Mt. Scott or the Springwater divisions. The facts herein are nearly identical with the incidents detailed in the Milwaukee case, and show that passengers are carried on the Mt. Scott division for 5 cents to Lents, where a further charge of 5 cents is made for carrying them to Lents Junction and other places to and including Gates. Passengers are also carried from Portland over the Oregon City division or the Sellwood branch to Golf Junction and thence east to Nickum for 5 cents, when a further charge of that sum is made for carrying them to Kerrigan, Lents Junction and other stations to and including Gates. The trackage distance from Portland or from the boundary thereof to Gates by the way of either of the divisions by which that station can be reached on the plaintiff's cars is farther than the trackage distance from the City of Portland or its limits to the utmost extent of the Oak Grove district. No transfers are given to passengers on the Oregon City division, although such privileges are granted to those that travel on the Mt. Scott and the Springwater divisions.

Such discrimination is unjust, and based on the conclusions reached in the Milwaukee case, the decree herein is affirmed.

240 Case No. 6968, Drawer No. 652.

Be it Remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 4th day of October, 1909. Whereupon on this Tuesday, the 21st day of December, 1909, the same being the 27th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland, Clerk,

when the following proceedings were had:

(Oak Grove Case.)

PORTLAND RAILWAY LIGHT & POWER COMPANY, a Corporation, Appellant,

v.

RAILROAD COMMISSION OF OREGON, Respondent.

Appeal from Marion County.

This cause having, on the 23rd day of November, 1909, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence in this cause, and then reserved for further consideration. And the court, having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds there is not error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court, having considered the findings of fact and conclusions of law made by the court below in this cause, finds that the findings of fact are correct and are sustained by the evidence, and that the conclusions of law are correctly deduced therefrom. It is further ordered that said findings of fact and conclusions of law be, and they are, adopted and found as the findings of fact and conclusions of law in this court.

And the court, having examined the decree of the court
241 below, finds that it correctly adjudicates the rights of the parties hereto. It is now ordered, adjudged and decreed by this court that the decree of the court below in this cause rendered and entered be adopted, found and decreed to be the decree of this court in this cause.

And the said appellant, having given an undertaking on appeal, and also as a stay, with the American Surety Company of New York as its surety, it is further ordered that the respondent recover

off and from the appellant and its said surety its costs and disbursements in the court below taxed at $10.00, and its costs and disbursements in this court taxed at $ —; and also such sum as damages which may be found against the appellant in the court below in this cause under the terms of its said undertaking.

And it is further ordered by the court that this cause be remanded to the court below from which this appeal was taken with directions to enter a decree in accordance herewith, and to ascertain what damages, if any, have been suffered by the respondent and enter a judgment against the appellant and its said surety for such sum.

242 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Assignments of Error on the Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

Comes now the Portland Railway Light and Power Company the above named plaintiff (appellant) and files the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the Supreme Court of the United States to the Supreme Court of the State of Oregon, from the decree made by the Supreme Court of the State of Oregon on the 21st day of December, 1909, in the above entitled cause and the proceedings had prior thereto in the above entitled cause, and upon the decision of the Supreme Court of the State of Oregon in denying the petition for rehearing of the above named plaintiff (appellant) in the above entitled cause made and filed therein on the 7th day of June, 1910, and said plaintiff (appellant) respectfully submits that in the record, proceedings and decision in said cause and on said petition for rehearing and final judgment of the Supreme Court of the State of Oregon in the above entitled cause, there is manifest error in this, to-wit:

I.

That the court erred in holding and deciding that the order of the Railroad Commission of Oregon on which the above entitled suit was brought rendered on the 30th day of January, 1908, is not in conflict with and in violation of the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America, and which said order assumes and seeks (1) to deprive the above named plaintiff, (appellant) of its property without due process of law, (2) to deprive and to deny to the plaintiff (appellant) (a citizen of the State of Oregon) the equal protection of the law.

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II.

The court erred in holding that said order of the Railroad Commission of Oregon is not in conflict with and in violation of the provisions of Section 10 of Article I of the Constitution of the United States of America and that said order is not in violation thereof.

III.

The court erred in holding that by and under the provisions of said order of the Railroad Commission of Oregon plaintiff (appellant) is not deprived of its property without due process of law.

IV.

The court erred in holding that said order of the Railroad Commission of Oregon does not deny the plaintiff (appellant) the equal protection of the law.

V.

The court erred in holding that said order of the Railroad Commission of Oregon and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the legislative departments of the State of Oregon.

VI.

The court erred in holding that Chapter 53 of the General Laws of Oregon for the year 1907, enacted by the legislative assembly of the State of Oregon at the legislative session thereof held in the year 1907, does not abridge the rights, privileges and immunities of this plaintiff, (appellant) as guaranteed by the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America.

VII.

The court erred in holding that said order of the Railroad Commission of Oregon is not in violation of Section 10 of Article 1 of the Constitution of the United States of America, violating the obligation of contract.

VIII.

The court erred in denying plaintiff's (appellant's) petition for *for* rehearing duly filed in the above entitled cause.

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IX.

The court erred in construing Section 48 of Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said Section 48 as being limited to a consideration of relative mileage from the corporate limits of the City of Portland to different points on different lines of the railway of the plaintiff in error outside the corporate limits

of said City of Portland, and denying the right and duty of the defendant in error to consider all of the dissimilar circumstances and conditions surrounding the service between different points on said lines of railway, in determining whether or not the rates of fare charged by plaintiff in error on one of said lines are unreasonable or unjustly discriminatory, thereby denying to plaintiff in error the equal protection of the laws and abridging the rights and privileges of plaintiff in error guaranteed to it under the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

X.

The court erred in holding that defendant in error had the power under said Chapter 53 of the General Laws of Oregon for the year 1907, to enforce an order fixing a rate of fare for transportation to a point beyond the corporate limits of the City of Portland from a point within said city which allowed plaintiff in error no additional compensation for the portion of said transportation outside of said city, notwithstanding the fact that by franchise and contract between the plaintiff in error and the City of Portland, plaintiff in error is authorized to charge and collect the amount of fare so fixed by defendant in error for transportation entirely within said corporate limits and notwithstanding the further fact that by the provisions of said Chapter 53 the defendant in error is expressly prohibited from exercising any jurisdiction over the transportation of passengers solely within the limits of said city.

XI.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn
245 in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 1 of the 14th Amendment of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Article 1 of the 14th Amendment of the Constitution of the United States of America.

XII.

The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 10 of Article I of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Section 10 of Article I of the Constitution of the United States of America.

XIII.

The court erred in granting and entering a decree in favor of defendant (respondent) and not entering a decree in favor of the plaintiff (appellant).

Wherefore, said Portland Railway Light and Power Company prays that the judgment, decree and decisions aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things which it has lost by the action and because of the said judgment, decree and decisions.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway Light and Power Company, Plaintiff (Appellant).

246 [Endorsed:] Case No. 6968, Drawer No. —. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Assignment of Error and Prayer. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in error.

247 In the Supreme Court of the State of Oregon.

Case No. 6968.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Appellant,
vs.
RAILROAD COMMISSION OF OREGON, Respondent.

Petition for Writ of Error to the United States Supreme Court.

To the Honorable F. A. Moore, Chief Justice of the Supreme Court of the State of Oregon:

Now at this time comes the Portland Railway, Light and Power Company, a corporation, plaintiff and appellant herein, feeling itself aggrieved by the decision of the Supreme Court of the State of Oregon by that certain judgment and decree therein entered in the above entitled cause in favor of the defendant and against this plaintiff, on the 21st day of December, 1909, and petitions the above entitled Court for an order allowing said plaintiff and appellant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf provided, and said plaintiff and appellant says that in said judgment and decree and the proceedings had prior thereto in the above entitled cause, certain errors were committed to the prejudice of this

plaintiff and appellant, all of which will in more detail appear from the assignment of errors to be filed in the matter of such writ of error.

And said plaintiff and appellant asks that an order be made by the Supreme Court of the State of Oregon fixing the amount of security which said plaintiff and appellant shall give and furnish upon said writ of error, and upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

248 And said plaintiff and appellant further asks this Court for allowance of time in which to file its assignment of errors in this matter be fixed by this Court.

And said plaintiff and appellant further shows that a federal question was made in said cause necessary to the decision of said cause, to-wit:

That the order of the Railroad Commission of Oregon, against which said suit was brought, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also Section 2 of Article XI of the Constitution of the United States, and that the said judgment and decree of the said Supreme Court of the State of Oregon is repugnant to and in conflict with said Section 1 of the Fourteenth Amendment and said Section 2 of Article XI of the Constitution of the United States, and that a decision of said federal questions was necessary to said judgment and decree rendered.

Wherefore, said plaintiff and appellant prays that a writ of error to said Supreme Court of the United States be allowed and that citation be granted and signed upon the plaintiff and appellant filing in the Supreme Court of the State of Oregon its assignment of errors and upon the filing and approval of such bond within the time fixed by the order of this Court as hereinbefore prayed for, and that upon compliance with such order and with the terms of the statute in such cases made and provided, said bond and writ of error may operate a supersedeas; and that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of Oregon be reversed, and that a transcript of the record, proceedings and papers in the above entitled cause duly authenticated may be sent to the said Supreme Court of the United States, and that an order be made that until the expiration of the time to be allowed by the Supreme Court of the State of Oregon for the filing of said assignment of errors

249 and bond that no mandate issue out of the Supreme Court of the State of Oregon to the Circuit Court of the State of Oregon for the County of Marion.

FREDERICK V. HOLMAN,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway, Light and Power Company, Plaintiff and Appellant.

250 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Portland Railway Light and Power Company (a

corporation), appellant (Plaintiff), vs. Railroad Commissioner of Oregon, Respondent (Defendant). Petition for Writ of Error to Supreme Court of the United States. Filed June 9, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. Frederick V. Holman and Franklin T. Griffith, Attorney- for Portland Railway, Light and Power Company.

251 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),

vs.

RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oregon.

The above entitled matter coming on regularly to be heard upon the petition of the Portland Railway Light and Power Company, plaintiff, (appellant) therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon examination of said petition and the record in said matter and the assignments of error filed therein, and desiring to give said Portland Railway Light and Power Company an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States and that the bond for the sum of Twenty Thousand ($20,000.00) Dollars presented by said Portland Railway Light and Power Company is hereby approved which shall act as a supersedeas.

It is further ordered, that pending the determination of said writ of error, said Portland Railway Light and Power Company shall continue to issue to each person traveling as a passenger upon the Oregon City division of the railway of said plaintiff (appellant) between the stations of Milwaukee Heights, Courtney, Oak Grave, Center, Risley and First and Alder Streets in the City of Portland, Oregon, in either direction, and paying a cash fare therefor of fifteen (15¢) cents, a receipt or other evidence to the effect that five cents of said fifteen cents cash fare has been paid by such person or passenger, subject to repayment to such person or passenger by said plaintiff (appellant), should the decree of this court in said cause be affirmed by the Supreme Court of the United States.

FRANK A. MOORE,
Chief Justice of the Supreme Court of Oregon.

Dated June 13, 1910.

252 [Endorsed:] O. G. Case No. 6968. Drawer No. —. Orig. No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff in error,

vs. Railroad Commission of Oregon, Defendant in error. Order allowing writ of error. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman, Franklin T. Griffith, 811-814 Electric Bldg., Portland Oregon, Attorneys for Plaintiff in error.

253 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF OREGON, Defendant in Error.

Know all men by these presents: That the above named Portland Railway Light and Power Company, as principal, and Oregon Surety and Casualty Company (a corporation duly incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at the City of Portland, Oregon), as surety, are held and firmly bound unto the Railroad Commission of Oregon, (hereinafter called "said obligee") in the sum of Twenty Thousand ($20,000.00) Dollars lawful money of the United States to be paid to said obligee, its successors, representatives and assigns, and for the benefit of whom it may concern, the payment of which well and truly to be made, said principal and surety bind themselves and their respective successors jointly and severally by these presents.

Whereas, the above named principal has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the State of Oregon.

Now, therefore, the conditions of this obligations are such that if the above named Portland Railway Light and Power Company shall prosecute its said writ of error, to effect and answer all costs and damages if it shall fail to make good its plea and shall pay all compensation of whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of said Railroad Commission of Oregon dated January 30th, 1908, as amended April 11th, 1908, had not been stayed and sus-
254 pended during the period transpiring from the time of taking said writ of error until the final determination of the above entitled suit in the Supreme Court of the United States as it or they may sustain by reason of said writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, said Portland Railway Light and Power Company has caused these presents to be signed in its corporate name by —— —— its President, and said Oregon Surety and Casualty Company has caused these presents to be signed in its corporate

name by its General Agent, a member of the Executive Board and by its General Counsel, this the 13th day of June, 1910.

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
By B. S. JOSSELYN, *President.*
OREGON SURETY AND CASUALTY COMPANY,
DOOLY & CO.,
By FRANK E. DOOLY, *General Agent;*
[SEAL.] By GAY LOMBARD,
Member of Executive Board;
By WILBUR & SPENCER, *General Counsel,*
By R. W. WILBUR.

Bond Approved and to operate as a supersedeas.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] No. 6968. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Railway Light & Power Co., Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Bond on Writ of Error. Filed June 13, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorney for Plaintiff in Error.

255 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Portland Railway Light and Power Company, a corporation, and Railroad Commission of Oregon, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath

happened to the great damage of the said Portland Railway Light and Power Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said
256 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of United States for the District of Oregon.

Allowed by
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:

[Seal Supreme Court, State of Oregon. 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

257 [Endorsed:] Case No. 6968, Drawer No. —. In the Supreme Court of the United States. Portland Railway, Light and Power Company, a corporation, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Writ of Error. Filed Jun- 13, 1910. J. C. Moreland, Clerk of the Supreme Court, by Arthur S. Benson, Deputy.

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Railroad Commission of Oregon, and to A. M. Crawford, Attorney General, and R. R. Giltner and R. E. Sewall, its attorneys, Greeting:

You are hereby cited and admonished to appear and be at the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof pursuant to the writ of error filed in the office of the Clerk of the Supreme Court of the State of Oregon, wherein Portland Railway Light and Power Company is

plaintiff in error and you, said Railroad Commission of Oregon, are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, this thirteenth day of June in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court, State of Oregon. 1859. The Union.]

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Due service of the within citation and receipt of copy thereof is hereby acknowledged this 16th day of June, 1910, at the office of the Attorney General of the State of Oregon.

A. M. CRAWFORD,
Attorney General, of Attorneys for Railroad Commission of Oregon, Defendant in Error.

259 STATE OF OREGON,
County of Marion, ss:

Franklin T. Griffith, of lawful age, being first duly sworn, on oath deposes and says:

That I was duly authorized and deputized by Honorable Frank A. Moore, Chief Justice of the Supreme Court of the State of Oregon, to serve upon the defendant in error the citation hereto attached. I served the same by delivering personally to R. E. Sewall one of attorneys of record for Railroad Commission of Oregon, defendant in error, a true and certified copy of said citation with all endorsements thereon, at Portland, Oregon, June 13th, 1910, at 4:30 P. M.

Witness my hand this 13th day of June, 1910.

FRANKLIN T. GRIFFITH.

Subscribed and sworn to before me this 13th day of June, 1910.

[Seal Clarence L. Eaton, Notary Public, State of Oregon.]

CLARENCE L. EATON,
Notary Public for Oregon.

260 [Endorsed:] No. —. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff in error, vs. Railroad Commission of Oregon, Defendant in error. Citation. Filed June 16, 1910. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Plaintiff in error.

261 In the Supreme Court of the State of Oregon.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff (Appellant),
vs.
RAILROAD COMMISSION OF OREGON, Defendant (Respondent).

Certificate.

I hereby certify that in the above entitled cause wherein Portland Railway Light and Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent and the question before the above entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the 30th day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway Light and Power Company claims that said order as amended deprived it of its property without due process of law and that it violated the obligation of a contract in which said Portland Railway Light and Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the Constitution of the United States of America, and that the decision of the above entitled court was against said Portland Railway Light and Power Company and said constitutional questions claimed by said Portland Railway Light and Power Company and that such decision was necessary to the decree rendered in the above entitled cause.

Dated the 13th day of June, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

262 [Endorsed:] No. 6968. Dept. No. —. In the Supreme Court of the State of Oregon. Portland Ry. Light & Power Co., Plaintiff & Appellant, vs. Railroad Commission of Oregon, Defendant & Respondent. Certificate of Federal Question. Filed June 13, 1910. J. C. Moreland, Clerk, By Arthur S. Benson, Deputy. F. V. Holman & Franklin T. Griffith, 811-814 Electric Bldg., Portland, Oregon, Attorneys for Appellant.

263 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Portland Railway Light and Power Company a corporation, plaintiff v. Oregon Railroad Commission, defendant, and also of the opinion of the court rendered therein and the decree entered thereon. That the transcript herein contains the Original Assignments of Error, Petition for Writ of Error, and Order Allowing same, a copy of the bond on appeal to the

U. S. Supreme Court, the Original Writ of Error, Citation and Certificate as to Federal Questions.

In testimony where-, I have hereunto set my hand — affixed the seal of said court at my office in Salem, Oregon, this 1st day of August 1910.

[Seal Supreme Court, State of Oregon. The Union. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

264 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oregon, in the city of Salem, this 1st day of August 1910.

[Seal Supreme Court, State of Oregon. The Union. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

Costs.

Costs of Transcript $130. paid by the Portland Railway Light & Power Co., this 1st day of August 1910.

265 In the Supreme Court of the United States.

PORTLAND RAILWAY LIGHT AND POWER COMPANY, a Corporation, Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON, Defendant in Error.

It is hereby stipulated between the attorneys of the respective parties that the original exhibits on file in the above entitled cause known in the Supreme Court of the State of Oregon as Milwaukee case, No. 6967, and also in the cause of the same title known as Oak Grove case, No. 6968, may be used by the Clerk of the Supreme Court of Oregon in preparing transcripts on writs of error to the United States Supreme Court in said two causes in lieu of copies thereof, and the same to be transmitted to the Clerk of the United States Supreme Court as a part of the records on such writs of error.

It is further stipulated that said original exhibits may be considered in each of said cases as exhibits in each thereof.

It is further stipulated that this stipulation may be attached to

the transcripts in said two causes after the same are filed in the United States Supreme Court.

Dated this Fourth day of August, 1910.

FRED'K V. HOLMAN,
Attorney for Plaintiff in Error.
A. M. CRAWFORD,
Attorney for Defendant in Error.

266 Based on the foregoing stipulation, it is ordered that the original exhibits herein be transmitted to the United States Supreme Court as part of the transcripts on writs of error in the two cases mentioned in said stipulation, and that the foregoing stipulation and this order may be filed in the Supreme Court of the United States.

Dated August 4, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

267 [Endorsed:] No. —. In the Supreme Court of the United States. Portland Railway Light and Power Company, Plaintiff in Error, vs. Railroad Commission of Oregon, Defendant in Error. Stipulation as to Original Exhibits. Frederick V. Holman, Attorney for Pl'ff in Error, A. M. Crawford, Attorney for Def't in Error.

Endorsed on cover: File No. 22,294. Oregon Supreme Court. Term No. 120. Portland Railway Light and Power Company, plaintiff in error, vs. Railroad Commission of Oregon. Filed August 11th, 1910. File No. 22,294.

12

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. ~~874 and 875~~ 119 & 120

PORTLAND RAILWAY, LIGHT & POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

MOTION TO ADVANCE.

A. M. CRAWFORD,
Attorney General of the State of Oregon,
For Defendant in Error.

(22,293 and 22,294.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 374 and 375.

PORTLAND RAILWAY, LIGHT & POWER COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF OREGON.

MOTION TO ADVANCE.

Comes now the defendant in error, above named, and moves the court to advance the above-entitled cases on the docket, and that the same may be brought on for hearing earlier than in their regular order, and, if convenient to the court, be set down for hearing some time during the early part of January, 1912. And, as grounds for this motion, the defendant in error respectfully shows to the court:

That these are suits in equity, brought by the plaintiff in error against the defendant in error, in the Circuit Court of the State of Oregon for the County of Marion, restraining and suspending the operation of certain orders by the defendant in error until the final hearing and determination of these causes, and then that, upon such final hearing, to vacate and set aside such orders of the defendant in error.

That, in case No. 374, the order of the defendant in error was, in substance, that the plaintiff in error should cease and desist from demanding, charging, collecting or receiving, for the transportation of persons between Milwaukee, a suburb of Portland, and First and Alder streets, in the city of Portland, in either direction, the rates, fares, and charges set out in its Tariff O. R. C. No. 1, namely, 10 cents, and that the said plaintiff in error charge, impose, and collect, in lieu thereof, 5 cents each way, and furnish to each person paying said rate of 5 cents transfer privileges to lines of the company within the city of Portland.

That, in case No. 375, known as the Oak Grove case, the order of the defendant in error was, in substance, that the plaintiff in error should desist from demanding, charging, collecting or receiving, for the transportation of persons between Milwaukee Heights, Portland, Oak Grove, Center and Risley, and First and Alder streets, in the city of Portland, Oregon, in either direction, the rates,

fares, and charges set out in its Tariff O. R. C. No. 1, namely, 15 cents, and that it charge and collect, in lieu thereof, the sum of 10 cents each way, and furnish all persons who shall pay the said rate of 10 cents the same transfer privileges to the city lines of plaintiff in error as are accorded passengers traveling between Lents and First and Alder streets, in the said city of Portland, Oregon.

That case No. 374 is known as the Milwaukee case, and the station of Milwaukee is located 6.71 miles from the city of Portland, for which a charge of 10 cents is made, and no transfer privilege is given to city lines. The town or station of Lents is situated 7.69 miles distant from the city of Portland, and for which distance the plaintiff in error charges a 5-cent fare, with transfer privileges to its city lines. This was held by the Railroad Commission to be unjust discrimination. The company appealed to the Supreme Court of the State of Oregon, and the order of the Railroad Commission was sustained.

That, in case No. 375, known as the Oak Grove case, the station of Oak Grove is situated 8.48 miles distant, Center is 8.68 miles distant, Risley is 9.26 miles distant, and a charge of 15 cents is made for passengers from said line in either direction, to or from the city of Portland, with no transfer privilege to the city lines of the plaintiff in error, while Lents is situated 7.69 miles distant, as above mentioned, and a charge of 5 cents is made for travel

over the same, in either direction, with transfer privileges to its city lines. This was held by the defendant in error to be unjust discrimination. The plaintiff in error appealed to the Supreme Court of Oregon, where this order was also sustained; and plaintiff in error brings a writ of error to this court in both of said cases.

Defendant in error further respectfully shows to the court that many thousands of people use these lines daily, and are paying unjust rates and fares, and receiving no transfer privileges; that the order of the court was that all persons paying the fares during the pendency of the suits should receive a rebate check for the excess fare paid (that is, the difference between Tariff O. R. C. No. 1 and rates ordered to be substituted by the Commission); that the company gives these fares to the people who know these conditions and ask for same, but to others it does not.

Thus it is an advantage to the company to prolong the litigation, whether it wins or loses; also, that these rebate checks, being for 5 cents each, many are lost or mislaid, and the persons receiving the same will not be able to produce them and have them redeemed, providing these cases should be affirmed in this court.

The case is one of great importance to the State of Oregon, as other cases are awaiting decision, and it involves the right of the Railroad Commission of Oregon, among other things, to make an

order of this kind, where unjust discrimination exists.

Notice of this motion has been served on counsel for the plaintiff in error.

Respectfully submitted,

A. M. CRAWFORD,
Attorney General of the State of Oregon,
For Defendant in Error.

Nos. 119, 120. October Term, 1912.

IN THE

Supreme Court of the United States.

Office Supreme Court
FILED
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JAMES H. McKE

IN EQUITY.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Oregon.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK V. HOLMAN,
JOSEPH S. CLARK,
FRANKLIN T. GRIFFITH,
Attorneys for Portland Railway, Light & Power Company, Plaintiff in Error, and of Counsel.

International, 239 Chestnut St.

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IN THE

Supreme Court of the United States.

October Term, 1912. No. 119.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,

Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,

Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1912. No. 120.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,

Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,

Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

By stipulation in this court briefs are not filed in each case, but the briefs in one case apply to both.

STATEMENT OF THE CASE.

Portland Railway, Light and Power Company, plaintiff in error, is a corporation duly organized and existing under the laws of the State of Oregon, engaged in the operation of railway lines in and about the city of Portland, Oregon. The Railroad Commission of Oregon, defendant in error, is the duly appointed Commission created by the act of February 18, 1907, of the State of Oregon (Acts 1907, p. 67). This statute authorizes the Commission to correct railway rates which are unreasonable or unjustly discriminatory. Two petitions were filed before the Commission under the provisions of this statute, one by the town of Milwaukie, Oregon, and the other by the Oak Grove Improvement Association, complaining of certain of the railway company's rates, and the Commission, on January 30, 1908, entered an order in pursuance of each petition, one being Number 89 F 18 (Milw. Rec., pp. 39, 42), and the second Number 94 (Oak Grove Rec., pp. 38, 42). The first order required the railway company to reduce the fare charged by it between the city of Portland and Milwaukie, a suburban point on the Oregon City division of the railway company, from ten cents to five cents; and the second order required the railway company to reduce the fares charged by it between the city of Portland and Oak Grove and other stations in what is known as the Oak Grove group of stations from fifteen cents to ten cents. Both of these orders directed the railway

company to give to passengers from all of these stations on the Oregon City division the same transfer privileges over lines in the city of Portland, as it gives to passengers from Lents, a point on its Mt. Scott division.

The railway lines of the railway company at the time of the entry of these two orders consisted of 95.53 miles of single track. The Oregon City division runs from First and Alder Streets in the city of Portland in a general southerly direction 5.36 miles to Golf Junction at the city line, thence to Milwaukie, 6.71 miles from First and Alder Streets, and thence through the Oak Grove group of stations and various other stations to Oregon City 14.47 miles from First and Alder Streets and one mile further south to Canemah, the terminus of this division. The Mt. Scott division runs from the junction with the Oregon City division at a point in the city of Portland not far distant from First and Alder Streets in a general easterly and then southerly direction through the town of Lents to Lents Junction on the Springwater division. On this division the city boundary line is 3.87 miles distant from First and Alder Streets, Lents is 7.69 miles distant, and Lents Junction is 8.31 miles distant. The five-cent fare limit extends to the town of Lents. (Milw. Rec., pp. 111 and 117, and Rwy. Co. Exh. No. 3.) The Springwater division runs from Golf Junction easterly within the city to the city line 5.95 miles from First and Alder Streets, thence .56 of a mile to Nickum 6.51 miles from First and Alder Streets, thence still easterly through Lents Junction, Gates and other stations and southerly to Cazadero, about forty miles from First and Alder Streets.

The railway company has divided its lines of railway into zones, within each of which it charges a cash fare of five cents. The law of Oregon provides (B. & C. Annotated Codes and Statutes of Oregon, Sec. 2096)

that it shall be unlawful for any corporation, operating a line of street railway within the corporate limits of any city, to charge a rate of fare to any passenger exceeding the sum of five cents for any one continuous trip in any one general direction between any two points on the street railway line of such corporation within the corporate limits of such city. In conformity with this law the railway company has made the boundaries of its inner or five-cent zone conform to the boundaries of the city of Portland, except at certain points where it has voluntarily extended the boundaries of such zone to include additional territory, as in the case of Lents on the Mt. Scott division and Nickum on the Springwater division. A table showing the distance of the several stations from First and Alder Streets and the extent of the different zones on the different divisions and the cash fares charged is given in the Milwaukie Record at pages 33 and 34. The railway company has also established a system of commutation rates which are set forth in its Exhibit No. 2. The railway company filed a map in the Circuit Court as its Exhibit No. 1 (Milw. Rec., p. 87), which shows its entire system of railway lines and the several points which are mentioned in this proceeding. These points are shown upon the section of map reproduced at the end of this brief.

The railway company instituted two suits against the Railroad Commission in the Circuit Court of Marion County for the purpose of vacating and annulling these two orders, the first case being known as the "Milwaukie case" and the second case as the "Oak Grove case." The court, upon application of the railway company, granted a temporary injunction suspending the operation of the orders, but requiring the railway company to issue to each passenger a receipt upon which he would be able to collect from the com-

pany the excess fare paid by him, in the event that the orders should ultimately be sustained. The testimony taken in these two cases was referred back to the Commission, which modified the orders, but in no effect material to the issues involved. The Circuit Court decided that the rates complained of were not unreasonable, but were unjustly discriminatory, and also that the railway company was unjustly discriminating against passengers coming to the city from the Oregon City division, in refusing to give them the same transfer privileges that it gives to passengers from Lents, and for these reasons the court sustained the orders and dissolved the injunction. The railway company took both cases by appeal to the Supreme Court of the State. A new injunction order was secured, under which the company was required to continue the issue of the receipts to passengers.

The Supreme Court of the State affirmed the judgment of the lower court in both cases and both are reported under the title, Portland Railway, Light and Power Company vs. Railroad Commission of Oregon, the first in 56 Oregon 468, 105 Pac. Rep. 709, and the second in 57 Oregon 126, 105 Pac. Rep. 715. A petition for a rehearing filed in both cases by the railway company was denied. The opinion upon the rehearing is reported in 56 Ore. 485, 109 Pac. Rep. 273. A copy of the original opinion in the Milwaukie case is printed in the Milwaukie Transcript of Record at page 244 and the opinion upon the petition for a rehearing at page 281. A copy of the original opinion in the Oak Grove case is printed in the Oak Grove Transcript of Record at page 165. The injunction has been continued and the company is still issuing the receipts to its passengers.

In reaching the conclusion that unjust discrimination existed, the Supreme Court compared the rates to Milwaukie and the Oak Grove group of stations with

the rates to Lents and Nickum and other points on the lines of the railway company. The distance from First and Alder Streets to all of these various points was considered by the court and also the distances from them respectively to the city boundary line of the city of Portland. The court held that the cost of the lines to the several points was immaterial, also that it made no difference whether a great many people or a few people lived in the several territories through which these lines ran. The railway company contended that all of the facts and circumstances, including particularly the two points mentioned above, should be given full consideration in determining the question whether a rate to a particular point was unjustly discriminatory when compared with the rate to another point. In view of the fact that the principal comparison made by the parties and the court was between the ten-cent rate to Milwaukie and the five-cent rate to Lents, the railway company showed that the line to Milwaukie cost half again as much as the line to Lents, and that on the line to Lents it carried more than ten times as many passengers as it carried to Milwaukie, and that on the former line it carried a great many short riders, whereas on the latter almost all of the passengers are through passengers. The railway company further argued that it was not fair to compare the distances of these two points from the city boundary lines, that is, 1.35 miles to Milwaukie and 3.82 miles to Lents, because the city boundary line on the Mt. Scott division to Lents is only 3.87 miles from First and Alder Streets, whereas the city boundary line on the Oregon City division on the way to Milwaukie is 5.36 miles from the same point.

In this litigation a contract called the "Lents contract" has been very frequently referred to. It is a contract, dated April 30, 1901, between the Portland, Chicago and Mt. Scott Railway Company and the Port-

land City and Oregon Railway Company. The Portland Railway, Light and Power Company has succeeded to all of the rights of the Portland City and Oregon Railway Company under this contract. It appears that the Portland, Chicago and Mt. Scott Railway Company had been organized by certain parties living at Lents and in that neighborhood for the purpose of constructing a line of railway connecting with the railway system in the city of Portland. By the terms of this contract the P. C. and Mt. S. Company agreed to turn over to the P. C. and O. Company all of its line of railway in consideration of an agreement by the latter company that it would equip and complete the line, run cars over it according to a specified schedule and charge a fare not to exceed five cents. The Railway Company does not rely upon that contract as a protection against the Commission. Its position in regard to this contract is fully set forth at a later point in this brief.

The substance of the position of the Railway Company in this case is that no unjust discrimination has been shown and further, even admitting the existence of unjust discrimination, the rates prescribed by the Commission are confiscatory, unreasonable, arbitrary and unjust, and, therefore, the orders are unconstitutional and void.

SPECIFICATION OF ERRORS.

First.—The court erred in holding and deciding that the orders of the Railroad Commission of Oregon on which the above-entitled suit was brought, rendered the thirtieth day of January, 1908, are not in conflict with, and in violation of, the provisions of Section I of the Fourteenth Amendment of the Constitu-

tion of the United States of America, which said orders assume and seek (1) to deprive the above-named plaintiff in error of its property without due process of law, and (2) to deprive and to deny to the plaintiff in error (a citizen of the State of Oregon) the equal protection of the laws.

Second.—The court erred in holding that by and under the provisions of said orders of the Railroad Commission of Oregon the plaintiff in error is not deprived of its property without due process of law.

Third.—The court erred in holding that said orders of the Railroad Commission of Oregon do not deny to the plaintiff in error the equal protection of the laws.

Fourth.—The court erred in construing Section 48 of Chapter 53 of the General Laws of Oregon for the year 1907, and the term "like and contemporaneous service" employed in said section 48, as being limited to a consideration of relative mileage from the corporate limits of the city of Portland to different points on different lines of the railway of the plaintiff in error outside the corporate limits of said city of Portland, and in denying the right and duty of the defendant in error to consider all of the dissimilar circumstances and conditions surrounding the service between different points on said lines of railway, in determining whether or not the rates of fare charged by plaintiff in error on one of said lines are unreasonable or unjustly discriminatory, thereby denying to plaintiff in error the equal protection of the laws and abridging the rights and privileges of plaintiff in error guaranteed to it under the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Fifth.—The court erred in holding that defendant in error had the power under said Chapter 53 of the General Laws of Oregon for the year 1907, to enforce an order fixing a rate of fare for transportation to a point beyond the corporate limits of the city of Portland from a point within said city which allowed plaintiff in error no additional compensation for the portion of said transportation outside of said city, notwithstanding the fact that by franchise and contract between the plaintiff in error and the city of Portland, plaintiff in error is authorized to charge and collect the amount of fare so fixed by defendant in error for transportation entirely within said corporate limits and notwithstanding the further fact that by the provisions of said Chapter 53 the defendant in error is expressly prohibited from exercising any jurisdiction over the transportation of passengers solely within the limits of said city.

Sixth.—The validity of said act of the legislature of the year 1907, and of said order of the Railroad Commission of Oregon were drawn in question by the plaintiff (appellant) on the ground that they were in conflict with and in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and the validity of said act and of said order were upheld and affirmed by the above-entitled court and the said questions were necessary for the decision of this cause, and the court erred in holding that said act and said order were not in violation and contravention of Article 1 of the Fourteenth Amendment of the Constitution of the United States of America.

ARGUMENT.

The Fourteenth Amendment to the Constitution of the United States has been a great bulwark of protection to the railroads of the country against unjust and unreasonable regulations imposed by state legislatures or by commissions acting under the authority of state statutes. In a great majority of these cases the regulation complained of has been a regulation of rates and the complaint of the railroad company has been that the prescribed rates are confiscatory in that they are not sufficiently high to allow the railroad company to earn a fair return upon its capital invested in serving the public. It is well settled that if a railroad company can show that the prescribed rates will not allow it to earn a fair return, the rates will be declared unconstitutional, invalid and void for the reason that they deprive the railroad company of its property without due process of law and deny to it the equal protection of the laws.

This principle has been fully established by a long line of cases, including Reagan vs. Farmers' Loan & Trust Company, 154 U. S. 362; Smith vs. Ames, 169 U. S. 466; St. Louis, Etc., Railroad Co. vs. Gill, 156 U. S. 648, and Wilcox vs. Consolidated Gas Company, 212 U. S. 19.

The claim of the railroad companies in each of the above cases was that the rates prescribed were confiscatory. A rate prescribed by a commission may violate the constitutional rights of a railroad company even though it cannot be shown to be confiscatory. In Railroad Company vs. Smith, 173 U. S. 684, the regulation imposed upon the railroad company was that it should sell mileage tickets at less than the maximum rate allowed by law. The railroad company objected on the ground that the regulation was unjust and unreasonable and its position was sustained. The court used the following language:

"The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

. . . . . .

"In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated."

The Fourteenth Amendment to the United States Constitution protects the railroad companies of the country against all unjust and unreasonable regulations. The power of the state authorities to regulate the railroads is limited to such regulations as can properly be designated reasonable and just. In this connection the opinions of the court in Wisconsin, Minnesota & Pacific Railroad Company vs. Jacobson, 179 U. S. 289, and in the case of Atlantic Coast Line Railroad Company vs. North Carolina Corporation Com-

mission, 206 U. S., page 1, are of interest. The Jacobson case came to the Supreme Court of the United States on writ of error from the Supreme Court of the State of Minnesota to review a judgment affirming a decision requiring track connections at an intersection of railroads. Mr. Justice Peckham spoke as follows:

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.
>
> "We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error.
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> . . . . . .
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> "The distinction between this case and that of Lake Shore & M. S. R. Co. vs. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. Rep. 565, is plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and un-

mixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the legislature should be held to constitute such reason."

The case of Atlantic Coast Line Railroad vs. North Carolina Corporation Commission, 206 U. S. 1, came to the Supreme Court of the United States on writ of error from the Supreme Court of North Carolina. The State court had sustained an order of the State Corporation Commission requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company. The particular order in question was held not to violate any provision of the United States Constitution and the decision of the State court was affirmed, but Chief Justice White (then Mr. Justice White) in delivering the opinion of the court used the following language:

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to

the due process and equal protection clauses of the Fourteenth Amendment. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

"In coming to consider the question just stated it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws."

The Supreme Court of the United States in many recent cases has been called upon to pass upon the reasonableness of state statutes and orders of state commissions made under the authority conferred by state statutes. See the following cases:

C. M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418;

Seaboard Air Line vs. Florida, 203 U. S. 261;

Atlantic Coast Line vs. Florida, 203 U. S. 256;

Seaboard Air Line vs. Seegers, 207 U. S. 75;

Missouri Pacific Railway vs. Nebraska, 217 U. S. 196.

The Portland Company contends that these orders of the Railroad Commission of the State of Oregon which it is undertaking to have vacated and set aside are unreasonable, confiscatory, arbitrary and unjust, and that they unduly, unfairly and improperly affect

its pecuniary rights and interests and deprive it of its property without due process of law and deny to it the equal protection of the laws.

In presenting its argument plaintiff in error will take up in order and elaborate upon the following sub-heads:

I. Decision of the Oregon Supreme Court.
II. The Lents contract.
III. The discrimination prohibited by the statute is unjust discrimination, which requires a judicial investigation of all the facts and circumstances, and there has been no such investigation in this case.
IV. The old rates were not unjustly discriminatory.
V. The transfer question.
VI. Even if unjust discrimination has been established that would not justify the Commission in prescribing confiscatory or unreasonable rates.
VII. These orders of the Commission are confiscatory.
VIII. These orders of the Commission are unreasonable, arbitrary and unjust.
IX. Conclusion.

I.

DECISION OF THE OREGON SUPREME COURT.

The Oregon Supreme Court points out that the Act of February 18, 1907, authorizes the Commission upon proper complaint to investigate and order just and reasonable fares upon finding that those complained of are unreasonable or unjustly discriminatory. The court found that the old rates were not unreasonable but that they were un-

justly discriminatory. It compared the ten-cent rate to Milwaukie with the five-cent rates to Lents and Nickum and held that the Milwaukie ten-cent rate was unjustly discriminatory as compared with these five-cent rates. It made a similar comparison of the fifteen-cent rate to the Oak Grove group of stations with the ten-cent rates to other points and reached a similar conclusion. Having determined that these old rates were unjustly discriminatory, it still remained to determine whether the reduced rates prescribed by the orders of the Commission were proper. The court determined that they were on the theory that the railway company having fixed a rate of five cents to Lents, thereby asserted the value of the services rendered and that it could not charge any more for similar services on the Oregon City division to points an equal distance beyond the boundaries of the city. The court also held that the passengers from Milwaukie and the Oak Grove group of stations were entitled to the same transfer privileges given by the Railway Company to the passengers from Lents. Other matters were considered, including particularly the force and effect of the Lents contract, but the foregoing is a fair statement of the substance of the decision. The following extracts from the three opinions, the first in the Milwaukie case (Milwaukie Record, p. 244), the second in the Oak Grove case (Oak Grove Record, p. 165), and the third upon the petition for a re-hearing (Milwaukie Record, p. 281), show that the foregoing statement is correct.

In the Milwaukie case the court said:

> "The ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service, but the Railroad Commission law authorizes an investigation upon a

complaint as to a charge which is in any respect 'unreasonable or unjustly discriminatory.' Sec. 28. It is not necessary, therefore, that the rate charged should be unreasonable, for if it is unjustly discriminatory, it is sufficient to authorize a regulation thereof. An examination of the evidence fully justifies the finding, made by the trial court in confirming the order of the Railroad Commission, that the rate from Portland to Lents and from such city to Nickum, and the transfer privilege granted to passengers on the Mt. Scott and the Springwater divisions, are unjustly discriminatory as against Milwaukie."

In the Oak Grove case the court said:

"The facts herein are nearly identical with the incidents detailed in the Milwaukie case (105 Pac. 709), and show that passengers are carried on the Mt. Scott division for five cents to Lents, where a further charge of five cents is made for carrying them to Lents Junction and other places to and including Gates. Passengers are also carried from Portland over the Oregon City division or the Sellwood branch to Golf Junction, and thence east to Nickum for five cents, when a further charge of that sum is made for carrying them to Kerrigan, Lents Junction, and other stations to and including Gates. The trackage distance from Portland or from the boundary thereof to Gates by the way of either of the divisions by which that station can be reached on the plaintiff's cars is farther than the trackage distance from the city of Portland or its limits to the utmost extent of the Oak Grove district. No transfers are given to passengers on the Oregon City division, although such privileges are granted to those that travel on the Mt. Scott and the Springwater divisions.

"Such discrimination is unjust; and, based on the conclusions reached in the Milwaukie case, the decree herein is affirmed."

Upon the petition for a re-hearing the court said:

> "Upon the other question, the discrimination as to the amount of fare charged the respective communities by plaintiff, we are not entirely free from doubt as to the proper remedy. It was said in the main opinion that 'the ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service.' Using that statement as a premise for an argument, it is urged in the motion that such statement is a finding that the specified rate is per se reasonable, which giving effect to the constitutional guaranties heretofore noted, precludes the state or its agent from making any reduction. But it was stated in immediate connection with that remark that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory.' 'The fact that a rate is per se reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, Sec. 838."

It is therefore clear that the basis for the decision of the Supreme Court of Oregon was that the old rates were unjustly discriminatory and it was admitted that they were not unreasonable. The court having determined the existence of unjust discrimination, proceeded to consider the question whether the Commission was justified in prescribing the lower rates. After discussing the Lents contract, the court in the Milwaukie case said:

> "The contract rate of five cents, however, was taken as a basis of a reasonable compensation by which to measure the fare to be charged on the Oregon City division for an equal distance and for conceding the same transfer privileges that are granted on the Mt. Scott division."

At a later point in the opinion the court, after stating the argument of counsel that the reduced rates would not afford a reasonable return upon the capital invested and that it was not proper to speculate as to the probable effect upon the plaintiff's business or upon any change in the population or the value of the property in the affected district and that if any reduction was necessary, the cutting in half of the Milwaukie rate was excessive, unjust and unreasonable, used the following language:

> "We do not think it necessary to discuss either of these question; for the plaintiff having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division an equal distance beyond the boundaries of the city of Portland."

The substance of the decision, therefore, is that unjust discrimination was established, both in the mat-

ter of fares and in transfer privileges, and that the railway company had itself determined that a five-cent rate to Milwaukie was a fair rate by charging that amount for service to Lents.

II.

THE LENTS CONTRACT.

It is important to understand the force and effect of this contract upon the rights of the parties to this litigation. A copy of the contract appears in the Milwaukie Transcript of Record at page 80. It bears date April 30, 1901, and the parties are Portland, Chicago & Mt. Scott Railway Company and Portland City & Oregon Railway Company. The Oregon Water Power & Railway Company succeeded to all of the property and rights of the Portland City and Oregon Railway Company and the Portland Railway, Light & Power Company succeeded to all of the property and rights of the Oregon Water Power & Railway Company. By this contract the Portland, Chicago & Mt. Scott Company agreed to sell and convey to the Portland, City & Oregon Company, all of its rights of way and railway track running from Hawthorne Avenue in the city of Portland to the town of Lents and the latter company agreed to equip the line for electric power and to operate it according to a schedule set forth and to charge not to exceed five cents. This agreement contained an express condition that if the Portland City & Oregon Company should fail within ten years to perform the covenants to be by it performed as set forth in the contract or should abandon the road or attempt to tear up or remove it, that company would upon demand of the Portland, Chicago & Mt. Scott Railway Company, turn back all of the property conveyed and turned over under this agreement.

The Supreme Court of Oregon in its opinion rendered in the Milwaukie case, considered the question whether the orders of the Commission impaired the obligation of this contract and held that they did not, for the reason that the company could not bind the Commission or restrict its action by any such contract, The court said:

> "Thus in Bullard vs. Northern Pacific R. Co., 10 Mont. 168, it was held that under the provisions of the Interstate Commerce law (24 U. S. Stat. 379) a contract made prior to the passage thereof (Feb. 4, 1887) for the transportation of freight at a rate and on terms violative of that law, could not be enforced against the carrier to recover rebates due upon goods carried after such act went into effect."

The court also points out that neither the orders of the Commission nor the decrees confirming them, conflict in any manner with the terms of this Lents agreement. We do not contend that the orders of the Commission of which we complain violate or impair any obligation of this Lents contract, nor do we contend that the railway company is protected by this Lents contract against rate regulation by the Commission. The court in discussing this point in the opinion rendered upon the petition for a rehearing said:

> "Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare, because of the alleged contract between its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power as was held in the main opinion to thus bind the state or restrict it in its future regulation of fares."

As stated above we do not contend that the railway company had any lawful right or power to bind the state or restrict it in its future regulation of fares, nor do we contend that the Lents contract had or was intended to have any such effect. We do not admit, however, for a moment that the Lents contract is properly characterized as a "wrongful act." The situation presented at the date of this contract, to wit, April 30, 1901, was that the Portland, Chicago & Mt. Scott Railway Company had secured certain rights of way and had constructed thereon a certain railway line, which could be readily made to connect with the line of the Portland City & Oregon Railway Company in the city of Portland. The former company was owned or controlled by certain people living or owning land in the Lents district and no doubt the purpose of these people was to develop that territory. These people offered to sell and transfer these rights of way and this railway line to the Portland City & Oregon Railway Company, free and clear of all incumbrances and without any consideration other than the agreement of the Portland City & Oregon Railway Company to complete and equip the line and to run cars over it according to a specified schedule and to limit the fare to five cents. The arrangement was a perfectly reasonable one and did not involve any wrong to any one.

At a later point in this opinion upon the petition for a rehearing, the court said:

> "Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie, and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the roadbed con-

veyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal right of a competing locality diminished by municipal or other subscriptions advanced for the building of the road. Beale & Wyman, Sec. 839."

We do not deny that, in jurisdictions where unjust discrimination between localities is prohibited, the right of one locality is not increased nor the equal right of a competing locality diminished by special advantages given by one of the two competing localities. Beale & Wyman, in Section 839, refer to the Interstate Commerce Act or similar acts, which prohibit unjust discrimination as between localities. In section 831, they discuss the question whether any locality has a right to complain of rates at common law, and show that at common law the carrier deals with individuals and not with cities or towns and that the wrong, if any, is against the individual shippers at the various stations. The last paragraph of section 832 reads as follows:

"Except so far as it has an evidentiary bearing on the reasonableness of the rate in question, rates from other places or other points of shipment are not material at common law."

Section 838 is as follows:

"*General Principles of Statutory Regulation.*

"But though discrimination between localities is not illegal at common law, it is not infrequently made so by statute; and it is well to examine the question in some detail in order to reach a proper understanding of the statutory provisions. The rule does not forbid all differences between localities, but such only as are undue or unreasonable; for the statutes generally have a saving clause affecting dis-similar conditions and circumstances."

The first statute in Oregon bearing upon this proposition is the act of 1907, under which this rate regulation proceeding was instituted. Prior to that date the people living at Milwaukie and at the Oak Grove group of stations had no right to complain of any rate given by the railway company to the people of the Lents district. The people of Lents gave a good and valuable consideration to the predecessor of the railway company, "being the value of the roadbed conveyed to plaintiff's predecessor in consideration of that agreement," as stated in the opinion rendered upon the petition for a rehearing. It was a reasonable and proper contract for the parties to make, and the five-cent fare for which the contract provided was a reasonable and proper fare under the facts and circumstances. We may admit that after the act of 1907 was passed this Lents contract might not of itself be a good defence against a charge of unjust discrimination in rates. Still, prior to the passage of that act of 1907 the discrimination in rates as between these localities, if such discrimination existed, was fully justified by this Lents contract and was not a matter concerning which any one living on the Oregon City division had any right to complain. Moreover, since the question whether the fares were unjustly discriminatory must be determined upon a consideration of the conditions existing at the institution of this proceeding, any facts relative to conditions prior to that time are irrelevant.

It may be true that the Lents contract with its five-cent fare was responsible for the development of the Lents district. It may possibly also be true that, if the Milwaukie district had been given a five-cent fare, that district would have been developed just as rapidly as the Lents district. We do not believe that this would have been the result,

but we contend that it is entirely immaterial whether such result would have followed or not. The parties who petitioned the Railroad Commission to reduce these rates to Milwaukie and the Oak Grove group of stations, on the ground that they are unjustly discriminatory, based their cases upon the proposition that the five-cent rate to Lents had developed that district and that the ten-cent rate to Milwaukie had retarded the development of that district, and likewise the fifteen-cent rate to the Oak Grove group of stations had retarded the development of that district. Practically all of the testimony introduced by the parties undertaking to secure and sustain these orders related to these questions, that is, the great development of the Lents district and the retarding of the development of the Milwaukie district and the district tributary to the Oak Grove group of stations, and that the five-cent rate to Lents and the ten-cent rate to Milwaukie and the fifteen-cent rate to the Oak Grove group of stations had been responsible for this result. An examination of this testimony shows that the development of the Lents district had been accomplished prior to the filing of the petitions with the Railroad Commission for the reduction of these rates on the Oregon City division, in fact, prior to the passage of the act of February 18, 1907, creating the Railroad Commission and prohibiting rates that are unjustly discriminatory as between localities. These parties seem to have overlooked the fact that, in order to establish their case, they must show that the rates which they claimed were unjustly discriminatory must be shown to have been unjustly discriminatory at the time the petitions were filed. In the findings of fact, (of Circuit Court, Milw. Rec., p. 37, Oak Grove Rec., p. 35; adopted by Sup. Ct., Milw. Rec., p. 253, Oak Grove Rec., p. 166), the following appears:

"9.

"That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small, that now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of passengers between First and Alder Streets, in the city of Portland, and Lents, and intermediate points."

It will be noticed that this finding of fact relates to the population in the Lents district before and at the time the Lents contract was entered into. This finding of fact shows that the population had very materially increased as well as the value of real estate in the Lents district and that this increase in population and land values had been in great measure due to the five-cent fare. All of this may be absolutely true and yet it can have no bearing upon the right of any of the people living on the Oregon City division to a reduction of their rates. In order to establish any such right it must be shown that at the time they complained, their rates were unjustly discriminatory. The fact that the Lents district has a very much larger population than the Milwaukie district, or the district tributary to the Oak Grove group of stations, tends to show that the people living in the Lents district are entitled to a lower rate of fare than the people living in Milwaukie or at any of the Oak Grove group of stations. The fact that there are so many more people living in the Lents district than in these other districts on the Oregon City division establishes the fact that the line serving the Lents district is naturally a more profitable line, and that the people living in that district are entitled to a lower rate than people living in

a less populous district. The fact upon which the parties complaining of the rates on the Oregon City division placed most reliance, to wit, that the Lents district has become more populous, because it has enjoyed a five-cent rate of fare prior to the date when these complaints were filed with the Railroad Commission and prior to the passage of the act of February 18, 1907, has no bearing whatever upon the rights of the parties, except that it shows a reason for a lower rate to Lents than to Milwaukie and the Oak Grove group of stations.

Finding of fact No. 10 is open to the same suggestions which we have set forth above with reference to No. 9, and the same is true of finding of fact No. 11. Finding of fact No. 16 (Milwaukie Record, p. 37) is quite important. It reads as follows:

"16.

"That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the town of Milwaukie are unjust and unreasonable, discriminatory and give undue preference."

It will be remembered that the Supreme Court of Oregon did not find the rates to Milwaukie and to the Oak Grove group of stations unjust or unreasonable, but did find them unjustly discriminatory.

We admit that the Lents contract with its five-cent rate of fare, which we contend was fully justified because of the consideration set forth in the contract itself, may have been in large part responsible for the building up of the Lents district, but no one living on the Oregon City division had any

right to complain of that fact, certainly not until the act of February 18, 1907, was passed. All of the testimony and findings of fact and conclusions of law showing that prior to these dates the Lents district had been rapidly developed and that the development of the districts on the Oregon City division had been retarded and that the rates of fare to these respective districts were responsible for this result, has nothing whatever to do with the rights of the parties to this litigation.

It is very evident that there is a good deal of rivalry between the several suburban districts just outside of the city of Portland. The people living in each district are jealous of the progress made by other districts. The people living on the Oregon City division looked with envy at the rapid increase made in population by Lents and the adjoining territory. They were convinced that this result was occasioned by the five-cent fare enjoyed by the people of this territory ever since April 30, 1901, the date of the Lents contract. These people on the Oregon City division also could not help but see that Lents is 7.69 miles from First and Alder Streets and yet has a five-cent fare, while Milwaukie is only 6.71 miles from First and Alder Streets and the people are charged a ten-cent fare. They also could not help but see that Lents is 3.82 miles distant from the city boundary line, while Milwaukie is only 1.35 miles outside of the city. These distances of track mileage when considered in connection with the fares charged to the several points evidently made a very deep impression upon the people living at Milwaukie and at the Oak Grove group of stations. They were keen to secure a five-cent fare to Milwaukie and a ten-cent fare to the Oak Grove group of stations, if it was possible to do so, and as soon as the Oregon statute of 1907, prohibiting unjust discrimination as between localities, was enacted they commenced this proceeding. They overlooked the fact that any ad-

vance made by Lents prior to the enactment of this statute, whether due to the five-cent fare or any other cause, was not material to their case. They may have thought that they could eliminate the greater population of Lents and adjoining territory as one of the facts and circumstances to be considered in determining this question of unjust discrimination, if they could show that this greater population was due to the five-cent fare which the people in this district had been enjoying since the execution of the Lents contract. This proposition, of course, is not sound, but unless this was the view of the parties who petitioned the Railroad Commission to reduce these rates on the Oregon City division because of unjust discrimination, we are unable to see why all of this testimony was introduced showing the increase in population in the Lents territory prior to the enactment of the statute of 1907 and undertaking to show that this fact was caused by the five-cent fare for which the Lents contract provided. The Supreme Court of Oregon did not comment upon this matter, but based its decision upon track mileage alone. In considering the question of unjust discrimination track mileage alone will not determine the issue. There are many other facts and circumstances just as important, or even more important than track mileage, which must be considered before any sound conclusion can be reached upon the question whether the old rates to Milwaukie and to the Oak Grove group of stations were unjustly discriminatory; but the Lents contract is not one of these facts and circumstances. This contract required the railway company to charge a five-cent fare to Lents, but we do not contend that it is one of the facts and circumstances which can affect or determine the question whether under the statute the five-cent rate to Lents is unjustly discriminatory when compared with the ten-cent rate to Milwaukie or the fifteen-cent rate to the Oak Grove group of stations.

III.

THE DISCRIMINATION PROHIBITED BY THE STATUTE IS UNJUST DISCRIMINATION, WHICH REQUIRES A JUDICIAL INVESTIGATION OF ALL THE FACTS AND CIRCUMSTANCES, AND THERE HAS BEEN NO SUCH INVESTIGATION IN THIS CASE.

The Oregon Railroad Commission Act (Chap. 537, Laws of 1907) forbids only unjust discrimination. It does not forbid all discrimination, but only that which is unjust, the test being as to whether the service is "a like and contemporaneous service" (Sec. 48), or whether the preference or advantage is "undue or unreasonable" (Sec. 49), or whether any prejudice or disadvantage is "undue or unreasonable in any respect whatsoever" (Sec. 49), or whether the rates or fares are "in any respect unreasonable or unjustly discriminatory" (Sec. 28), or simply "unreasonable or unjustly discriminatory" (Secs. 28, 30 and 55). This, in the light of the decisions under the English statutes and under the Interstate Commerce Act, leaves no doubt as to what the law is under the Oregon statute.

Galveston Chamber of Commerce vs. Railroad Commission (Ct. of Civil App. of Texas, 1911), 137 S. W. 737;

R. R. Commission vs. Galveston Chamber of Commerce (Ct. of Civ. App. of Texas, 1908), 115 S. W. 94;

Cohn, et al., vs. St. Louis I. M. & S. Ry. Co. (Springfield Ct. of App. Mo., 1910), 133 S. W. 59;

State vs. Central Vt. Ry. Co. (Sup. Ct. of Vt., 1908), 71 Atl. 194;

Puget Sound Elec. Ry. vs. R. R. Commission of Washington (Sup. Ct. of Wash., 1911), 117 Pac. 739;

Platt vs. LeCocq (C. C., D. S. D., 1906), 150 Fed. 391;

Little Rock & Ft. S. Ry. Co. et al. vs. Oppenheimer et al. (Sup. Ct. of Ark., 1897), 43 S. W. 150;

Louisville & N. R. Co. vs. Commonwealth (Ct. of App. of Ky., 1898), 46 S. W. 702.

There can be no doubt that in determining whether unjust discrimination exists the court must take into consideration all of the facts and circumstances under which the transportation is carried on. In Texas & Pacific Ry. Co. vs. Interstate Commerce Commission (1895), 162 U. S. 197, the railway company attacked an order of the Commission which prohibited it from carrying any article imported into the country upon through bills of lading destined to any place within the United States, except for the charges described in its inland tariff covering other similar freight from the same port of entry to the same place of destination. The court said:

> "We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the seaboard in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic."

Continuing, the court said (p. 219):

> ". . . we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the stat-

ute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission. . . . The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

The court continued (p. 239):

". . . we think it plain that if, in such a case, the Commission . . . has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. . . . The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill."

To the same effect are the following cases:

Little Rock & Ft. S. Ry. Co. vs. Openheimer (Ark.), 43 S. W. 150;
Louisville & Nashville R. R. Co. vs. Commonwealth (Ky.), 46 S. W. 702;
Wright vs. B. & O. R. R.,32 Pa. Super. Ct. 5;
C. & A. R. R. Co. vs. People, 67 Ill. 111;
Galveston Chamber of Commerce vs. R. R. Commission, supra;
Harp vs. Choctaw, O. & G. Ry. Co. (C. C., W. D. Ark., 1902), 118 Fed. 169; Affirmed by the C. C. A. (8th Cir., 1903), 125 Fed. 445.

The Supreme Court of Oregon considered track mileage as the determining element and, based upon that alone, held that the Railway Company's rates in controversy were unjustly discriminatory. It has been held frequently that mileage, while a circumstance to be considered with all the other facts and conditions in fixing rates, is by no means controlling or the most important.

Interstate Com. Commission vs. Louisville & N. R. Co. (1896), 73 Fed. 409;
Farmers' Loan & Trust Co. vs. Northern Pacific Ry. Co. (1897), 83 Fed. 249;
Weil vs. Pennsylvania R. R. Co. (1906), 11 Inter. Com. Rpts. 627.

In Interstate Commerce Commission vs. Louisville & N. R. Co., supra, the court said (p. 424):

". . . the mileage, while a circumstance to be considered with all the other facts and conditions, is by no means controlling or the most important. As early as 1872 it has been fully demonstrated in England that equal mileage as a basis

for settling the difficulty was entirely impracticable. In that year the committee upon the amalgamation of railways reported upon this subject, and the substance of this report is found in the note to the case of Ransome vs. Railway Co., 1 Nev. & McN. 63, which was one of the Coal Traffic Cases. In reporting against equal mileage, the committee said:

> '(a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit.
>
> '(b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances.
>
> '(c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low.' "

The Supreme Court of Oregon did not consider all of the facts and circumstances surrounding the transportation to Lents and Nickum as compared with the transportation to Milwaukie and to the Oak Grove group of stations, in deciding the question whether there was justification for the existing differences in rates. On the contrary, the court refused to consider any of the facts and circumstances excepting only the distance of the several points discussed from the boundary line of the city of Portland. This is clearly shown by the quotations given below from the several opinions.

This presents a situation very similar to that which was presented in the case of C. & A. R. R. Co. vs. the People, 67 Ill. 11. The Constitution of Illinois directed the legislature to pass a law to prevent unjust discrimination and extortion in rates. In pursuance of this constitutional provision the legislature passed an act prohibiting the railroads from charging a larger compensation for transportation of freight over any distance than it is charging at the same time for freight of the same class over less distance. The court held that this applied to discrimination between localities as well as to shipments over the same tracks and made track mileage the test of the discrimination. The court, after speaking of the constitutional provision, says (p. 23):

> "This provision, expressly directing the legislature to pass laws to prevent unjust discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and, by implication, it restrains the power of the legislature to a prohibition of those which are unjust. That was undoubtedly the object of the legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just

> or unjust, in the charges for transporting the same class of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies, which they are not allowed to meet by evidence showing the reason or propriety of the discrimination. . . . The legislature can not raise a conclusive presumption of guilt against a natural person from an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or propriety of the act, and confiscating his property as a penalty for the supposed offense. Those provisions of our constitution which forbid the deprivation of life, liberty or property, except by due process of law, and which guarantee the right of trial by jury 'as heretofore enjoyed,' and the right in all criminal prosecutions to appear and defend in person and by counsel, would all be violated by such a law. . . . That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance, than it is charging for the same distance over another part of its road, or in the opposite direction, is not, of itself, conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration."

The court then comments upon the right of the railway company to charge higher rates where the cars have to return empty and proceeds as follows:

> "We give this illustration for the purpose of showing that a difference of price for the same distance of transportation, is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt, as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted."

The court then comments upon the right of the railroad to offer any evidence it can by way of explanation of any alleged unjust discrimination, and then says:

> "It might, for example, show in the present case, that the lumber shipped to Lexington had caused a greater expense in loading or unloading than that shipped to Bloomington. This may not be a very probable defense, but defenses may nevertheless exist, and if they do, the companies should not be deprived of the right to make them.
>
> "Before this act can be enforced, it should be so amended as to correspond with the requirement of the constitution by directing its prohibitions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance, or for the same distance, merely *prima facie* evidence of unjust discrimination, instead of conclusive evidence, as it now is, and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not."

The Oregon statute of February 18, 1907, did not prohibit all discrimination but only unjust discrimination. The orders of the Commission, however, are based upon its conclusion that the old rates are unjustly discriminatory and it decides this question upon a consideration of track mileage only. When these orders are attacked by the railway company on the ground that unjust discrimination cannot be determined by track mileage only, but that all of the facts and circumstances must be taken into consideration, the answer given by the Supreme Court of the State of Oregon is that all of these other facts and circumstances may be disregarded and that track mileage alone is sufficient to determine the question of unjust discrimination. The Supreme Court of Illinois in the

case just discussed held that a statute framed on that basis was unconstitutional and void. It necessarily follows that an order resting upon the same basis must likewise be unconstitutional and void. The statute was amended after this decision was handed down and the amended statute was under consideration in Illinois Central R. R. Co. vs. People, 121 Ill. 674, also in People vs. Baltimore & O. S. W. R. Co., 246 Ill. 474. The above case in 67 Illinois was affirmed in these two later cases.

IV.

THE OLD RATES WERE NOT UNJUSTLY DISCRIMINATORY.

One of the principal points upon which the railway company has relied and still relies in its effort to have these orders of the Commission set aside is that no such unjust discrimination has been shown or exists. We will first examine the reasons given by the Supreme Court of Oregon for its conclusion that these old rates are unjustly discriminatory. In the opinion in the Milwaukie case the court presents the question very clearly in the following language:

> "It is insisted that the cost of constructing the Mt. Scott division was fifty per cent. less per mile than that of the Oregon City division, that the number of passengers on the latter line, north of Milwaukie, is less than one-twentieth of those over the Mt. Scott division, and that the service performed is so dissimilar, and rendered under such diverse circumstances and conditions, as to make the difference in fare between Lents and Portland and between that city and Milwaukie not unjustly discriminatory against the latter town."

It would be difficult to put the question more clearly and we naturally expect that the court will

satisfactorily answer it. The opinion proceeds as follows:

> "In the vicinity of the Mt. Scott division is a district between the city boundary and the town of Lents which contains many people, and, based on this fact, it is argued that the Lents contract, in effect, makes such territory a part of Portland, and extends to the inhabitants of that locality the five-cent fare, that, considering the question of unjust discrimination, the comparison of fares must be a relative estimate of the respective distances from the city boundary, and that for all practical purposes the remoteness from the Portland terminal should be computed as if all such district were within the corporate limits of that city. The five-cent rate of transportation for a continuous trip in one direction between any two points extends by compulsion to the boundary of Portland (B. & C. Comp. Sec. 2096), where the second district of rates begins, unless the first division is voluntarily continued beyond that circuit."

Note the suggestion in the last clause of the above quotation. It indicates that the railway company might voluntarily extend the five-cent zone beyond the city boundary lines. That is exactly what the railway company did. For reasons which to it seemed quite sufficient it did not confine the five-cent zone to the city boundaries, but voluntarily extended that zone beyond the city boundaries in the direction of Lents and included the Lents territory in that zone. When attention is called to the fact that the city boundary is only 3.87 miles from First and Alder Streets on the line of the Mt. Scott division, which runs to Lents, and that it is 5.36 miles from the same point on the Oregon City division and 5.95 miles on the line of the Springwater division, one very good reason is shown for the extension of the five-cent zone to take

in the Lents territory. At a later point in this brief attention will be called to several other very good reasons which led to the same result. After the language quoted above, the opinion proceeds as follows:

> "As fares outside that city on suburban lines of railway now consist of multiples of five cents, all ten-cent rates would be expected to begin at the point of intersection of the line of the road and the city boundary from which place the extent of the second district should be computed. By making the limits of the municipality the beginning of all ten-cent fares no discrimination against any locality can exist except such as the peculiar form of the boundary may sanction; and the several districts, coinciding with the respective multiples of five cents, ought to be parallel with the exterior boundaries, if the railway lines were built at right angles thereto."

But the railway company has voluntarily taken the Lents district into the five-cent zone and there is no evidence whatever to show that this was improper action on its part, in fact, the testimony clearly establishes that the extension of the five-cent zone so as to take in Lents was a reasonable and proper act on the part of the railway company.

The court has fallen into error in adopting the city limits as the limits of the five-cent zone. The company was prohibited by the law of the State and by its franchise from the city of Portland from restricting the five-cent zone to narrower limits than the city boundary lines; but neither the statutes of the State nor the franchise under which the company operates within the city of Portland prevents the company from extending the five-cent zone to take in territory outside of the city limits.

Immediately after the above, the court concludes this paragraph with the following sentence:

> "The density of the population along the Mt. Scott division, between the city limits and the town of Lents, does not make that territory a part of Portland, nor can the Lents contract, in effect incorporate such district within that city."

The court next proceeded to consider the meaning of the words "like and contemporaneous service" in the statute and the force and effect of the failure of the statute to use the words "under substantially similar circumstances and conditions." After this digression, the opinion returns to the subject discussed above and we find the following language:

> "The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system."

We have quoted above everything that the court has to say in this opinion upon the question which, as shown above, it so clearly presented for discussion, that is, whether the several facts, to wit, that the Oregon City division cost fifty per cent. more to construct per mile than the Mt. Scott division and that the number of passengers on the latter line north of Milwaukie is many times less than the number on the Mt. Scott division and that the service performed is so dissimilar and rendered under such diverse circumstances and conditions, constitute a sufficient basis to justify an extension of the five-cent zone to include Lents, so that the ten-cent rate to Milwaukie was not unjustly discriminatory when compared with the five-cent rate to Lents. It can hardly be said that the court satisfactorily answered that question. The fact that the line to

Milwaukie cost much more to construct than the line to Lents is a pretty good reason for charging a higher rate of fare to Milwaukie than to Lents. The further fact that the travel over the line to Lents is many times as heavy as the travel over the line to Milwaukie, is another pretty good reason for charging more for a ride to Milwaukie than for a ride to Lents. The court passes over these points without comment excepting such as is set forth in the last quotation from the opinion to the effect that these arguments do not make Lents a part of the city of Portland. This is all true, but it is aside from the point. All of these propositions do make it reasonable and proper to include the Lents district within the five-cent zone and they all represent very good arguments in favor of the proposition that a ten-cent rate to Milwaukie is not unjustly discriminatory when compared with the five-cent rate to Lents.

All that the court had to say in its original opinion in the Milwaukie case concerning the dissimilar circumstances and conditions surrounding transportation over the two lines in controversy has been set forth. It said nothing on this point in its original opinion in the Oak Grove case. In its opinion, denying the railway company's motion for a rehearing (56 Ore. 485, 109 Pac., 273; Milwaukie Record, p. 283), the only discussion of this question is the following:

> "Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the roadbed conveyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal

> right of a competing locality diminished by municipal or other subscription advanced for the building of the road. Beale and Wyman, Section 839."

Although the court decided, as set forth in this quotation from the opinion, that the Lents contract did not justify the lower rate to Lents, it did not decide the question whether the greater cost of construction on the Oregon City line than on the Lents line was any justification for this lower rate. It did not discuss at all any of the other facts and circumstances surrounding the transportation to these two points respectively.

At a later point in the first Milwaukie opinion the court uses the following language:

> "It will be remembered that the rate to Lents was established pursuant to the terms of an agreement, but it appears that the plaintiff voluntarily made a five-cent fare on the Springwater division from Portland to Nickum, which latter place is .56 miles outside the city limits, and thereby manifested a preference for Nickum as against Milwaukie, which is 1.35 miles outside such boundary."

Notice the comparison of the distances from the city boundary to these two points. Milwaukie is two and a half times as far from the city limits as Nickum is. Here again the railway company has voluntarily extended the five-cent zone so as to take in Nickum, and the reason for this voluntary extension cannot be better stated than in the language of the court which immediately follows the above quotation. It said:

> "The reason assigned in the brief of plaintiff's counsel for such discrimination is that where the Springwater division crosses the city limits, the roadbed consists of a high fill that extends east quite a distance to a deep cut, which latter continues beyond Nickum; that at the boundary no public highway exists by which passengers can

> approach the railroad; that the nearest place where the railway can be reached without trespassing on private land is at Nickum; and that in consequence of such obstacles the cars cannot be stopped at the city limits. A passenger would be entitled to ride on this division from Portland to the city boundary for a five-cent fare; and, if he refused to pay a greater sum for further transportation he could be ejected from the cars at that place. Whether or not he could leave the track without going up or down it to some station where a public highway could be found is a question that affects the plaintiff only to the extent that the absence of such road or street might have a tendency to diminish travel, to overcome which and to promote the interests of the railway company, passengers are carried to Nickum. This, in our opinion, under the present statute, amounts to a discrimination."

See the testimony of Richard Scott, the Commission's witness, upon these points at page 199 of the Milwaukie Record.

Under the circumstances outlined above the most reasonable thing that the railway company could do would be to extend the five-cent zone beyond the city boundary so that it would take in Nickum. The railway company must carry to the city boundary line for a five-cent fare because the statute and its franchise from the city of Portland requires it. In view, however, of the situation presented at the city boundary on the way to Nickum as set forth in the above quotation, what possible objection could there be to the extension of the five-cent zone so as to take in Nickum. The railway company would certainly be subject to very severe criticism by the public, if it pursued the suggestion made in the foregoing quotation, that is, if it ejected any of its passengers at the city boundary where this line to Nickum crosses it, upon refusal to pay another fare. The nearest reasonable stop-

ping place is Nickum and the railway company very properly carries its passengers to that point without demanding an extra fare.

If it be true that the old rates were not unjustly discriminatory, it necessarily follows that the orders reducing them were arbitrary, unjust and unreasonable and on that account unconstitutional and void, because of the fact that the alleged unjust discrimination was the only basis upon which the court sustained them. We have heretofore indicated certain of the reasons which sustain the position of the railway company, that a ten-cent fare to Milwaukie is not unjustly discriminatory against that point, when compared with a five-cent fare to Lents. These reasons may be analyzed and classified as follows:

First.—The cost of constructing the Oregon City division to Milwaukie is fifty per cent. more per mile than the cost of constructing the Mt. Scott division to Lents. On this point see the testimony of F. I. Fuller, which appears at pages 155 and 156 of the Milwaukee record.

Upon the authority of Texas & P. R. Co. vs. Interstate Commerce Comm. (1895), 162 U. S. 197, whatever would be regarded by common carriers as matters warranting a difference in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." No one would deny that such a difference in the cost of construction would be regarded by common carriers as a matter warranting a difference in charges.

Second.—The Mt. Scott division runs through a thickly settled portion of the city of Portland for fifty-six blocks and beyond the city boundary the line runs on a street which is built up almost like a city all the way out to Lents. The cars stop at every street crossing within the city limits and there are about twenty-

three stations (Milwaukie Rec., p. 111) between the city limits and the town of Lents. The Oregon City division, on the contrary, after running a few blocks only from First and Alder Streets, runs through a district which is not built up at all and there are practically no stops on the line to Milwaukie except Golf Junction, which is just inside of the city boundary and is the point where the Springwater division leaves the Oregon City division. See testimony of J. J. Miller, a witness introduced by the railway company (Milw. Rec., pp. 118, 121); see also the testimony of John Risley (Milw. Rec., p. 212), Richard Scott (Milw. Rec., p. 195) and George N. Hively (Milw. Rec., p. 217), witnesses introduced on behalf of the Commission.

In Railroad Commission of Ky. vs. Louisville & Nashville R. R. Co., 13 Inter. Com. Com. Rep. 300, the Commission said (p. 307):

> "There is greater density of population and of traffic in the territory north of the Ohio River known as Central Freight Association territory, and in which Evansville is situated, than in territory south of the river in which Owensboro and Henderson are situated. Such differences in conditions reasonably and inevitably result in a different adjustment of rates in the respective territories. Generally the cost per ton of handling freight decreases in proportion to the increase in its volume."

Third.—A very large majority of the passengers who travel on the Mt. Scott division ride less than one-half of the entire distance that it is possible to ride for a five-cent fare. There are a great many short riders who pay their fares, ride a short distance, leave the cars and make room for other passengers. On the Oregon City division, on the contrary, over ninety per cent. of all of the passengers ride the entire distance

from First and Alder Streets to and beyond the city boundary. See testimony of J. J. Miller, a witness introduced by the railway company (Milw. Rec., pp. 118, 121); see also the testimony of John Risley (Milw. Rec., p. 212), Richard Scott (Milw. Rec., p. 195) and George N. Hively (Milw. Rec., p. 217), witnesses introduced on behalf of the Commission.

As explained by Mr. Fuller, the vice-president of the railway company and general manager of its railway department (Mil. Rec., pp. 157, 158), it is possible in operating street car lines within thickly populated districts to carry passengers in any one general direction for a maximum charge of five cents, even though the length of the possible ride may be fourteen miles, as in the city of Portland, for the reason that a great majority of the passengers travel a short distance and it is very rarely that a passenger will travel the full distance permitted for a single fare. See the testimony of Isaac Hill (Milw. Rec., p. 89), John B. Bigham (Milw. Rec., p. 95), Louis E. Armstrong (Milw. Rec., p. 99), Joseph M. Hart (Milw. Rec., p. 104), Frederick Heger (Milw. Rec., p. 109) and J. J. Miller (Milw. Rec., pp. 118, 119, 120).

Fourth.—In the year 1907, which was the year immediately before the taking of the testimony in this case, the total cash fares received and tickets sold on the Oregon City division was 1,174,421, showing that for the 15.47 miles of this division there were 75,916 riders per mile. On the Mt. Scott division for the same period the total number of cash fares taken and tickets sold amounted to 2,299,570 for the 8.38 miles of this division, showing 276,735 riders per mile of road. See Defendant's Exhibit No. 17. See the testimony of G. A. Brodie (Oak Grove Rec., p. 91), J. J. Miller (Milw. Rec., p. 119), Richard Scott (Milw. Rec., p. 196) and John Risley (Milw. Rec., p. 208).

If we compare the traffic density to Milwaukie with the traffic density on the Mt. Scott division, the difference in favor of the Mt. Scott division is even more marked. The railway company's Exhibit No. 10 shows that the total of tickets and cash fares to Milwaukie during the year 1907 was 187,458. The distance to Milwaukie from First and Alder Streets is 6.71 miles, which gives us a traffic density of 27,937 per mile as compared with a traffic density on the Mt. Scott division, 8.31 miles, of 276,735, a proportion of approximately ten to one.

That the volume of traffic creates a dissimilar condition has been repeatedly held by the Interstate Commerce Commission as well as by the courts.

Perry vs. Florida Co., 3 Inter. Com. Rep. 740;
I. C. C. vs. Ala. Midland R. R. Co., 168 U. S. 145-171;
Root vs. Long Island Co., 4 L. R. A. 331;
Dallas Freight Bureau vs. Mo. Kansas & Texas R. R. Co., 12 Inter. Com. Rep. 427;
Rice, Robinson & W. vs. Western N. Y. & Pa. R. R. Co., 2 Inter. Com. Rep. 298.

Fifth.—The city boundary line on the Mt. Scott division is only 3.87 miles from First and Alder Streets. In view of the fact that the city boundary line on the Oregon City division is 5.36 miles from the same point and on the Springwater division 5.95 miles from the same point, it seems only reasonable and proper that the five-cent zone should be extended beyond the city line on the Mt. Scott division, and the natural place to which to extend it is the town of Lents.

In view of all of these facts and circumstances it would have been an unjust and unreasonable act on

the part of the railway company if it had charged passengers from First and Alder Streets to Lents more than five cents. A five-cent fare to Lents under these facts and circumstances represented fair and full compensation for the service rendered and yielded to the railway company a fair return upon the amount of its capital invested in that part of its property. The five-cent fare to Lents pays the railway company very much better than the ten-cent fare to Milwaukie. The company could earn money on its business to Lents charging only a five-cent fare, but it lost money on its business to Milwaukie charging a ten-cent fare.

The theory of the Supreme Court of Oregon evidently was that the facts and circumstances surrounding the transportation on these several lines within the city of Portland was a matter of no importance in view of the fact that under the city franchise and under the State statute the railway company was prohibited from charging more than five cents for any ride within the city limits. If we consider the city limits as the limits from which the second five-cent charge shall commence, that is, if the five-cent zone is bounded by the city limits, it would appear to be unreasonable to carry a passenger through the city and on out to Lents for one five-cent fare and to charge ten cents for a similar ride from any point in the city to Milwaukie. Lents is three and one-half miles outside of the city limits while Milwaukie is only one and thirty-five one-hundredths miles outside of the city limits.

On this theory, the voluntary five-cent rate to Lents would make it necessary for the company to put into force and effect a five-cent rate from First and Alder Streets or any other point in the city of Portland to any point three and one-half miles beyond the city limits. We doubt whether the Supreme Court

of Oregon would sustain this position, for in its opinion it indicates that the company might voluntarily extend the five-cent zone to points outside the city limits. That court did not mean to indicate that if the railway company voluntarily extended the five-cent zone to one point outside the city limits, it would be necessary for it to extend that zone to all points equally distant beyond the city limits. The basis upon which the court determined that the ten-cent fare to Milwaukie is unjustly discriminatory, when compared with the five-cent fare to Lents, is entirely taken away when we appreciate that the railway company has done exactly what the court indicated it had the right to do; that is, voluntarily extended the five-cent zone to take in the Lents district. There is nothing in the evidence nor in the opinion of the court which indicates that the extension of the five-cent zone to take in the Lents district was unreasonable or improper or unjustly discriminated in favor of Lents as against any other town or section, but on the contrary, the evidence discloses facts which fully justify that extension. The whole basis of the court's finding of unjust discrimination is built up upon the theory that the five-cent zone is bounded by the city limits. The question which should determine whether there was any unjust discrimination, is the question whether under all the facts and circumstances the railway company was justified in extending the five-cent zone so as to include the Lents district. When the facts and circumstances presented by this record are given fair consideration, there can be no reasonable doubt that the railway company was fully justified in taking the Lents district into the five-cent zone, and if that conclusion is sound, it necessarily follows that the charge of unjust discrimination has not been established.

The court in the Oak Grove case called attention to the fact that the track mileage from the boundary of Portland to Gates by way of either of the divisions by which Gates can be reached, is greater than the track mileage from the city limits to the utmost extent of the Oak Grove district. Although this is true, Gates is entitled to a ten-cent fare as against a fifteen-cent fare to the Oak Grove group of stations, if we start with the proposition that the railway company was justified in extending the five-cent zone so as to take in the Lents district, for Gates is only 2.19 miles beyond Lents. The distance to Gates by way of Golf Junction and the Springwater division is 2.40 miles greater than by way of Lents and the Mt. Scott division. It would be unreasonable to charge a greater fare to Gates over the Springwater division than over the Mt. Scott division, even though the distance is greater. It is always possible to pick out apparent inconsistencies and discriminatory charges where five-cent zones are adopted, and yet it has been the common practice of street and suburban and interurban railway companies to adopt these five-cent zones and this practice is a reasonable and proper one.

A very interesting and analogous case has been before the Wisconsin Railroad Commission, entitled Gillett vs. Milwaukee, Etc., Ry. Co., 1 Wis. R. R. Com. Rep. 689. The charge against the railway company was that the rate to Wauwatosa outside of the city of Milwaukee was unjustly discriminatory when compared with the rates charged by the railway company to other suburban points. The following is a full quotation from the opinion:

> "The petitioner in support of its claim, that the city of Wauwatosa is being discriminated against, relies on substantially the following facts: The lines of the respondent companies ex-

tend beyond the limits of the city of Milwaukee at eleven different points. As to eight of these points the one-fare limit is placed beyond the city limits. As to three of such points the one-fare limit is placed at the city limits. The Lake Park line, the North Milwaukee line and the Walnut Street line to Wauwatosa, all have their one-fare limit placed at the city limits of Milwaukee. The Whitefish Bay line, the Wells Street line to Wauwatosa, the line to Calvary Cemetery, the National Avenue line, the Greenfield Avenue line, the Muskego Lake line, the Tippecanoe line, and the interurban line to Cudahy and beyond, all have their single-fare limits placed outside of the city of Milwaukee and at varying distances from its boundary lines. From the central point in the city of Milwaukee, from which distances are reckoned, it is claimed by the petitioner, that the distance to the single-fare limit on the Howell Avenue line, to West Allis and to St. Francis, is substantially the same as the distance to Wauwatosa; that the travel between Wauwatosa and Milwaukee is large, and that no substantial reason exists for charging the residents of Wauwatosa two fares where the residents of other portions of the territory beyond the limits of the city of Milwaukee are charged but one fare for substantially the same service. In this connection, it might be mentioned that the Hawley road runs generally north and south and is some distance west of the boundary limits of Milwaukee and that it is used as a single-fare limit on the Wells Street line, the line to Calvary Cemetery and the National Avenue line.

. . . . . .

"The petitioner testified to having made several trips on the Howell Avenue or Tippecanoe line beyond the city limits to the single-fare point, and testified to the number of passengers carried beyond the city limits on the outward trip and to the city limits on the inward trip. Mr. L. B. Gregg testified to the same effect, and each of the witnesses testified that there was more traffic between

Milwaukee and Wauwatosa than there was between the city limits of the city of Milwaukee and the single-fare point on the Tippecanoe line.

. . . . . .

"The petitioner's counsel contends that there is no reason or logic in drawing a line of demarcation between urban and suburban service, as defined by Mr. Beggs; that the boundary lines of the city are mere arbitrary lines, as far as the transportation problem is concerned; that the suburb beyond the city limits is ordinarily as populous as is the part of the city to which it is adjacent and that as to frequency of cars and the frequency of stops, the service afforded the so-called suburban district is distinctly a city service. It was not, however, contended that there might not be a limit beyond which the single fare should not be applied, and the matter of determining where that limit should be placed will be involved in the hearing on the absolute reasonableness of the rate, rather than at the present time.

"Taking the central point in the city of Milwaukee from which distances appear to be reckoned in the time cards, the distance to Wauwatosa is six miles. The distance to the one-fare terminal at West Allis is five and one-fifth miles; to the one-fare terminal at St. Francis five and seven-tenths miles; and to the one-fare terminal on the Howell Avenue line six miles. The reason given for the extension of the single-fare limit on this line has been given heretofore, and is stated to be because of a bonus paid for the extension. The travel between Wauwatosa and Milwaukee would appear to be greater than between Wilwaukee and any of the other single-fare points named, except West Allis, from which point the traffic is exceedingly large. West Allis can be reached on a single fare on but one of the two lines that enter it. If the distance between the city limits and some of the single-fare points beyond those limits is considered, Wauwatosa is as near such limits as are some of the single-fare points alluded to.

. . . . . .

"Considering only conditions as they exist at the present time, it would be difficult to give any good reason why some of the points outside of the city of Milwaukee enjoy a single-fare rate, while Wauwatosa does not. Where such zones extend beyond the limits of Milwaukee, the outer limits must, perhaps, be fixed in a more or less arbitrary manner. Those who live outside the zone will generally have some cause of complaint. Wauwatosa comes close to the dividing line, considering the way in which the boundary lines are now fixed, with perhaps more reasons for including it within the single-fare limit than for excluding it. From the standpoint of unfair competition, there is no unjust discrimination practiced, if there is any discrimination at all. We mean by this, that if the respondents should seek to avoid discrimination by shortening the single-fare limits with which comparison is made, such action would not result in any benefit to the people of Wauwatosa. If they are paying a reasonable rate they are not suffering any injury by reason of the fact that other communities are paying less than a reasonable rate. We do not mean that this is a controlling reason for holding that there is no discrimination in the present case, and neither do we wish to be understood as holding that it is necessary to determine that a rate is unreasonably high, before lowering it on the ground that it is discriminatory. Such is not the law. It is our conclusion in the present case that the evidence is not sufficiently clear to warrant us in now holding that the rate should be lowered because it is discriminatory, in view of the fact that the whole question of the absolute reasonableness of the rates charged by the respondent is coming up for consideration as soon as its property is valued and its books are audited, and the fact determined as to whether or not its rates of charge are unreasonable.

. . . . . .

"One great difficulty with holding that there is a discrimination in the present instance, is the

fact that the rates of street-car lines are made on the zone system instead of on a mileage basis. A passenger is compelled to pay a single fare of four or five cents, depending on whether he uses a ticket or pays cash, if he rides but two blocks. Another may ride eight or ten miles for the same charge. The party who habitually takes a car a half-mile away from his place of business pays the same amount that a party does who may take a car six miles away. If both use the cars during the rush hours in the morning, the chances are that the long-distance passenger will be able to secure a seat, while the short-distance one will not. The short-distance passenger gets less for his money in the matter of travel, and frequently in the matter of service, and still, to say that he is discriminated against, is to say that the zone system is in itself discriminatory. It is not practical in street-car operation to make rates on a mileage basis, and the ordinances under which the street-car lines in the city of Milwaukee are being operated recognizes this fact and establish the zone system."

A fair consideration of all the facts and circumstances above enumerated necessarily leads to the conclusion that the ten-cent fare to Milwaukie and the fifteen-cent fare to the Oak Grove group of stations is not unjustly discriminatory against those localities when compared with the five-cent fare to Lents and the other fares charged by the railway company to points on the Springwater division. The alleged unjust discrimination was the only basis upon which the court sustained the orders. Therefore, if these old rates were not unjustly discriminatory, it necessarily follows that the orders reducing them were arbitrary, unjust and unreasonable and on that account unconstitutional and void.

V.

THE TRANSFER QUESTION.

There still remains to be considered the second ground of the alleged unjust discrimination; that is, the giving of transfer privileges to passengers coming from the Lents district and the refusal to give transfer privileges to passengers coming from Milwaukie and the Oak Grove group of stations. This proposition practically answers itself as soon as we admit that the Lents district was properly incorporated into the five-cent zone. Any passenger paying five cents within the five-cent zone is given the right to transfer to any other car within that zone without paying any additional fare. This principle has always been enforced even in favor of passengers coming from the Oregon City division who pay the five-cent fare on that division in the city of Portland, that is, after they have passed Golf Junction Station, for in that event they are given the right to transfer within the city. In view of these facts no unjust discrimination has been established in the matter of transfers.

VI.

EVEN IF UNJUST DISCRIMINATION HAS BEEN ESTABLISHED, THAT WOULD NOT JUSTIFY THE COMMISSION IN PRESCRIBING CONFISCATORY OR UNREASONABLE RATES.

The Supreme Court of Oregon did not consider whether the rates prescribed by the orders of the Commission gave a reasonable return to the railway company for the services rendered. The court sustained these rates upon the theory that the railway company in agreeing to accept a five-cent fare for carrying passengers to Lents thereby asserted the value of its services for transportation to that point, and that the

value of similar service on the Oregon City division, an equal distance beyond the city boundary lines, must be governed by this same measure. Immediately after stating this conclusion, the court said:

> "As illustrating this principle it is said in Menacho vs. Ward (C. C.), 27 Fed. 529, 532: 'The estimate placed by a party upon the value of his own services of (or) property is always sufficient, against him, to establish the real value; but it has augmented probative force and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.' "

The case of Menacho vs. Ward, supra, is in no sense analogous to the present case. The complainants in that case filed a bill to restrain the defendants from discriminating against complainants by charging higher rates for freight than they charged other shippers. Complainants were merchants in New York City, engaged in commerce between that port and Cuba, and the defendants were proprietors of steamship lines plying between New York and Cuba. Complainant alleged that the defendants announced to New York merchants engaged in the Cuban trade that they must patronize defendants' steamships and if they shipped over other lines they would be subjected to onerous discriminations by the defendants on further shipments that they might desire to send by the defendants' steamships. The court used the following language:

> "Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than oth-

ers for the same service is merely evidence for the latter, tending to show that he charges them too much; but, when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

. . . . . .

"The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them.

. . . . . .

"The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants

> a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of charges paid to obtain the delivery of the goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, 'as practical and efficient to the ends of justice' as the remedy in equity. Watson vs. Sutherland, 5 Wall. 74.
>
> "The motion for an injunction is granted."

The case presented by the above quotation is very different from the case presented by the record before this court. The suggested analogy is that unjust discrimination has been established and the Commission is justified in prescribing a rate to Milwaukie which does not exceed the rate to Lents. If we assume that unjust discrimination has been established, that fact does not prevent the railway company from objecting to a five-cent rate to Milwaukie on the theory that that rate is too low. It was not suggested in the case from which the foregoing quotation is taken that any of the rates charged by the steamship company were too low. The complainants established that the defendants were unjustly discriminating against them by charging them higher rates than they charged other shippers. The court ordered that the company should cease charging complainants these higher and discriminatory rates and should charge them the same rates as it charged other shippers to the same points. The company did not object to this order on the ground that the lower rates were confiscatory or unreasonable. The position of the company was that the evident discrimination

was justified. On this account this Menacho case has no bearing upon the issue raised here.

In the opinion rendered upon the petition for a re-hearing, the Supreme Court of Oregon cites and relies upon Beale and Wyman on Railroad Rate Regulation, sections 838 and 839. There is nothing in these two sections which conflicts with the position of the railway company. They sustain the proposition that a rate, even though it may be reasonable, may none the less be unlawful on the ground that it is unjustly discriminatory. These sections read as follows:

> "TOPIC B. UNDUE PREFERENCE OF LOCALITIES UNDER STATUTE.
>
> "*Section* 838, *general principles of statutory regulation.*
>
> "But though discrimination between localities is not illegal at common law, it is not infrequently made so by statute; and it is well to examine the question in some detail in order to reach a proper understanding of the statutory provisions. The rule does not forbid all differences between localities, but such only as are undue or unreasonable; for the statutes generally have a saving clause respecting dissimilar conditions and circumstances.
>
> "The general principle may be thus expressed in one brief paragraph. 'It is insisted that these differentials give an undue preference for the reason that they are without excuse or justification. If the assumption of fact embraced in this statement is true, the conclusion probably follows. A preference without legitimate excuse would be in and of itself an undue and unreasonable one.'
>
> "It follows from what has just been said that: 'A disturbance of a settled equality between localities by making for the first time a difference between them is prima facie unreasonable, and should be looked upon with suspicion.'

"*Section* 839. *Reasonableness of rate per se immaterial under statute.*

"Under the provisions of such a statute, the Interstate Commerce Act, for instance, the fact that a rate is per se reasonable does not disprove the charge that it is unlawful. If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive. The right of one locality in that regard is not increased, nor is the equal right of a competing locality diminished, by municipal subscriptions which were advanced for the building of the road."

These sections sustain the position of the court to the effect that a rate, even though it may not be unreasonable, may none the less be unlawful on the ground that it is unjustly discriminatory. This is in accordance with the Oregon statute which prohibits rates which are either unreasonable or unjustly discriminatory. These sections, however, do not justify an order of any commission, prescribing unreasonable and unjust rates in order to eliminate unjust discrimination. A number of the statutes on this subject provide specific remedies in cases of unjust discrimination, such as the payment of damages to the injured party. In actions under these statutes a complainant, after establishing the fact of unjust discrimination, is entitled to enforce the prescribed penalty. An example of this principle is the case of The Board of Trade of Lynchburg vs. Old Dominion Steamship Co., 6 I. C. C. Rep. 632. This was a proceeding instituted under the long-and-short-haul clause of the Interstate Commerce Act. The defendant railroad company had greatly reduced its rates to Knoxville, Tennessee, from New York, Providence and Boston during a particular period. During this same period

the rates to Lynchburg and intermediate locality were not reduced and the rates to that point were in excess of the new low rates to Knoxville. The suit was instituted to recover the excess of rates charged Lynchburg dealers on the ground that these rates were unjustly discriminatory when compared with the rates to Knoxville. Complainant succeeded in establishing the unjust discrimination and thereby became entitled to enforce the penalty which the act prescribed, which was a recovery of the excess. If in this case the complainant had undertaken to force the railroad company to reduce the rates to Lynchburg because of the reduced rates to Knoxville, the railroad company could very properly have defended on the ground that such reduced rates to Lynchburg, if put into force and effect, would be unreasonable and unjust and would not give to the railroad company a fair return upon its capital invested in serving the public.

We have failed to find any case where any commission or other authority has imposed upon a public carrier an unreasonable or confiscatory rate, because any particular rate has been shown to be unjustly discriminatory. If unjust discrimination exists in the rates involved in this case, the Commission has the power to make any appropriate order to eliminate the unjust discrimination. The proper method may be to raise the lower rate rather than to reduce the higher rate. This was suggested in the case of Gillett vs. Milwaukee, Etc., R. R. Co., 1 Wis. R. R. Com. Rep. 689, in the following language:

> "The question as to whether or not a discrimination is being practiced, may often be determined without passing upon the absolute reasonableness of the rates charged. Assuming that a discrimination exists, it is claimed by the petitioner that it is the duty of the Commission to remove the discrimination by reducing the Wauwatosa rate to the level of the rates charged between

points that form the basis of the discrimination. It is the claim of the respondents, on the contrary, that the question of the reasonableness of the rates, in any event, must be determined, and if the Wauwatosa rate is found to be reasonable, and the rates to the points in reference to which discrimination is claimed to exist are found to be unreasonably low, the discrimination should be avoided by raising the unremunerative rates."

The Oregon Supreme Court evidently had this point in mind, for in the opinion upon the rehearing it used the following language:

"Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare because of the alleged contract with its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power as was held in the main opinion to thus bind the State or restrict it in its future regulation of fares. On account, however, of the forfeiture clause of this contract, it was doubtless considered by the Commission that to order plaintiff to increase the rate of its fare at Lents in order to avoid the discrimination complained of would cause it to hazard a greater loss than to lower the rate of fare at Milwaukie. It therefore chose the latter and under the circumstances of the case we think it was justified in so doing, inasmuch as the forfeiture clause of the contract expires by limitation on April 30, 1911, after which time plaintiff will be free to act upon its own judgment in the premises and so to arrange its schedule of fares as to avoid any just complaint of discrimination."

It was not proper for the Commission to take into consideration these several matters. Neither the Com-

mission nor the court had any basis for assuming the power to decide for the railway company, whether or not to continue to charge a five-cent fare to Lents in order to avoid the forfeiture under its contract. The Commission could properly require the railway company to eliminate the unjust discrimination, assuming that it existed, but in regulating the company's fares, the Commission is precluded from violating the company's constitutional guarantees. The Commission imposed upon the railway company unjust, unreasonable and arbitrary rates, which are not sufficient to give to the railway company a fair return upon its capital invested in serving the public, and it justifies these rates upon the proposition that the railway company agreed to accept a five-cent rate to Lents, thereby asserting the value of that service, and that it must be governed by the same measure for similar service on the Oregon City division an equal distance beyond the boundaries of the city. It cannot be said that the railway company's Lents contract bestowed upon the Commission a power which it would not otherwise have had, viz., a power to impose upon the railway company rates of fare which are unremunerative and less than reasonable. The Lents contract did not protect the railway company against reasonable rate regulation by the Commission, but on the other hand, it did not give the Commission any reason or excuse for prescribing unreasonable rates.

The question of determining upon and fixing the rates to be substituted for those pronounced unjustly discriminatory should have been determined with due regard to appellant's constitutional rights, to protect which a thorough investigation of all the facts of the case was essential, and it was palpably erroneous for the Supreme Court of Oregon to affirm the action of the Commission in adopting the lowest fare charged by the company on any of its lines as the proper fare

to be charged on the company's other lines for a like distance, without having given any consideration to any of the other facts and circumstances. A carrier may voluntarily adopt rates which a commission has no power to prescribe. This question was considered in Lake Shore & Michigan Southern Railway Co. vs. Smith, 173 U. S. 684. In this case the Michigan Supreme Court held that a statute requiring the sale of one-thousand-mile tickets was a valid and constitutional act. The United States Supreme Court reversed this decision and held the act unconstitutional, using the following language:

> "It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

In the case of Southern Railway Company vs. Atlanta Stove Works, 128 Georgia, page 207, 57 S. E. Rep. 429, which involved the validity of an order of the Georgia Commission fixing railroad rates, the court, at page 434, used the following language:

> "When the carrier is forced to meet competition at a given point on its line, of necessity it must adjust its rates within the zone of the competitive point to the competitive rate to that point.

> This condition may be inartificially caused, and the adjustment by the carrier of its rates to such conditions cannot be accepted of itself as a justification for making a schedule of rates based on the voluntary action of the carrier. We recognize the carrier's right to manage its internal affairs by reducing its tariff below the commission rate, and that such low rate affords no basis for an arbitrary reduction of the Commission's maximum standard to the voluntary low rate of the carrier."

In Minneapolis vs. Minneapolis Street Railway Co., 215 U. S. 415, Mr. Justice Day, in delivering the opinion of the court (p. 435), used the following language:

> "Acquiescence in a regulation which may not have been deemed injurious and may have been deemed wise and expedient does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights."

It seems reasonably clear from the foregoing that the voluntary five-cent rate given by the railway company to the Lents district is no criterion or measure to be adopted by the Commission in prescribing a rate to Milwaukie and no justification to the Commission in forcing upon the railway company an unreasonable, confiscatory or discriminatory rate. The same criticisms apply to the new ten-cent rate to the Oak Grove group of stations.

In the opinion of the Supreme Court of Oregon rendered upon the petition for a re-hearing, the court considered the right of the Commission to direct the railway company to give transfer privileges over other lines to passengers coming from the Oregon City division; in fact, this question was directly presented by counsel for the railway company, on the theory that the lines of railway within the city, over which trans-

fers to certain passengers were given, were not owned by the railway company, but by another separate and distinct company, the Portland Railway Company. The court discussed the two questions involved in the charges of unjust discrimination, to wit, the fares and the giving of transfer privileges, and said:

> "As to the second of these questions, it is now maintained for the first time that the order of the Commission requires plaintiff to furnish such transfers to its passengers traveling from Milwaukie station into Portland, and that, to that extent, the order affects the rights of another corporation not a party to the proceedings, for which reason, if for no other, the order would be void. It is contended that at the time of the hearing before the Commission the plaintiff was the owner and operator of the three lines of railway described in the pleadings; that the Portland Railway Company, another corporation, was the owner of and operated all other street railways in Portland, and that the transfers spoken of in the record secured the privilege of traveling on such other street railways without the payment of additional fares; that if plaintiff were required by order of the Commission to furnish transfers to its passengers from the town of Milwaukie, and required that they be accepted by the owner of the railways to whom they were directed, the effect thereof would be to bind such owner, without it having been permitted to be heard. The Railroad Commission's order in that respect is not a positive command to the plaintiff to give transfers, nor that they be accepted by any one, but the order is, in effect, to cease an unlawful discrimination between the passengers from Lents and those from Milwaukie by desisting from refusing the latter the same transfer privileges as accorded to the former, and that plaintiff should furnish to all persons paying the rates of fare fixed by the Commission in its order the same transfer privileges accorded Lents passengers. The order of the Commission would, therefore, be

complied with by giving such transfers to all, as plaintiff saw fit to continue to give to Lents passengers, or by desisting entirely from its practice of giving transfers to Lents passengers. Which of these two courses is to be taken is left to plaintiff's option. It was not bound in the first place by any mandate of the law, or by any contractual obligation of its predecessor in interest, or of itself, to furnish transfers to Lents passengers. The giving of them was purely voluntary, and a gratuity, which, being refused to its other patrons, constituted an unlawful discrimination. This is within the power of the board to rectify by an order directed to the plaintiff alone."

If we admit the existence of unjust discrimination, it is difficult to find any reasonable objection to the order of the Commission requiring the railway company to give equal transfer privileges to all of its riders. Both on this question of transfers and the question of fares, the orders are objectionable because they are based on alleged unjust discrimination when no such unjust discrimination has been established. On the other hand, even with this admission, the order in regard to the fares is still objectionable, because the Commission, instead of confining itself to directing the railway company to eliminate the unjust discrimination, or to fixing rates with due regard to the railway company's constitutional rights, prescribes fares which are unreasonable, confiscatory and discriminatory.

VII.

THESE ORDERS OF THE COMMISSION ARE CONFISCATORY.

The railway company is entitled to earn a fair return upon the value of its property used in serving the public and any rate prescribed by the legislature

or by the Commission acting under legislative authority, which does not allow it to earn a fair return, deprives it of its property without due process of law and denies to it the equal protection of the laws. This proposition has, of course, been considered in a great many cases and the principles involved have become elementary. The proposition is usually presented in cases where a maximum rate has been prescribed as, for instance, two cents a mile upon a railway line. The same proposition has also been considered where a schedule of rates has been prescribed. The case presented by these orders of the Commission is a little different, for the orders change a very few only of the rates charged by the railway company upon its entire system of railway lines. The railway company had a schedule of rates before the Commission entered the orders, of which the railway company now complains, and these orders may be considered as amending this general schedule.

The railway company presented in its Exhibit No. 16 the earnings and operating expenses of its entire system of railways. This exhibit shows the following:

Operating Statistics all Departments O. W. P. & Ry. Company for Calendar Year 1907.

Total Railway Earnings.		
Passenger	$521,327.69	
Freight	158,006.20	
Mail	4,148.18	$683,482.07
Expenses.		
Passenger	$425,131.59	
Freight	104,524.39	529,655.98
Net Earnings		$153,826.09

The railway company further established by its evidence that it owns and operates 95.53 miles of single track. The value of this line was shown to be $30,000 a mile, making a total value for the 95.53 miles of $2,865,900. This figure does not take into consideration the hydro-electric plant of the railway company or make any provision for the furnishing of electric power for the operation of the railway system. Even on this basis the earnings are less than five and one-half per cent. upon this valuation of $2,865,900. A return of five and one-half per cent. to a railway company in this part of the country upon its investment used in serving the public is not enough. Under these circumstances any reduction of any of the rates by order of the Commission would seem to be unreasonable and any such order open to attack on the ground that it is confiscatory. In making these figures showing the net earnings for the calendar year 1907, amounting to $153,826.09, no allowance was made for depreciation. The testimony shows that a depreciation charge of five per cent. on properties of this kind is a reasonable depreciation charge. If we deduct five per cent. of $2,865,900, that is, $143,295, from the above figure of net earnings, to wit, $153,826.09, it leaves $10,531.09 to represent the return of the railway company upon its investment of $2,865,900, a little more than one-third of one per cent. This was the amount of the return received by the railway company under the old rates. If the rates prescribed by the Commission are to become operative, the earnings of the railway company will be less to the extent of the loss which will naturally follow from the reduction of rates ordered by the Commission.

The railway company undertook to show the amount of the loss of revenue which would result to it, if the rates prescribed by the Commission are allowed to become operative. The railway company's Exhibit

No. 10 shows that the total number of commutation tickets sold by it between Milwaukie and Portland for the year 1907 reduced to a one-way basis was 127,453, and its Exhibit No. 2 shows that the commutation rate between these points was seven cents. If the five-cent rate to Milwaukie goes into effect it will mean a reduction of two cents upon each one of these commutation tickets. This means a loss of $2,549.06. The railway company's Exhibit No. 11 shows that during this same period 60,005 ten-cent fares were collected and 46,146 fifteen-cent fares were collected on this Oregon City division. The testimony shows that there is very little travel between the suburban stations on this division, and it is fair to assume that practically all of these ten-cent fares and fifteen-cent fares represent transportation between the city of Portland and Milwaukie or the Oak Grove group of stations, and further that if the rates prescribed by the Commission become operative these ten-cent fares would become five-cent fares and the fifteen-cent fares would become ten-cent fares, a loss of five cents in each case, which would make a loss on these 106,151 fares of $5,307.55. In the above figure no account has been taken of the commutation tickets between Portland and the Oak Grove group of stations. The railway company's Exhibit No. 10 shows that, during the year 1907, 84,004 of these commutation tickets were sold. It also shows that the commutation rate to the several stations in this Oak Grove group is in every instance less than ten cents; which means that if the cash fare to the Oak Grove group of stations is reduced from fifteen cents to ten cents, it will not necessarily involve a reduction in the commutation rates to these points. The direct effect, therefore, upon the revenues of the railway company from the reduction of fares ordered by the Commission is as follows:

127,453	commutation fares reduced by two cents	$2,549.06
60,005	ten-cent fares reduced to five cents	3,000.25
46,146	fifteen-cent fares reduced to ten cents	2,307.30
		$7,856.31

This figure does not begin to show the loss of revenue which the railway company will suffer if the rates prescribed by the Commission shall become operative. There are a great many stations on the Oregon City division south of the Oak Grove group. There is a group of stations immediately south of the Oak Grove group to which the fare charged by the railway company is twenty cents. Oregon City and Canemah are farther south and the fare to each is twenty-five cents. If the rates prescribed by the Commission become operative, it will necessarily follow that the railway company will be required to reduce its twenty-cent fares to fifteen cents and its twenty-five-cent fares to twenty cents. This question was considered by the Supreme Court of Oregon in its opinion upon the petition for a rehearing. The court said:

> "It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City. We do not think this necessarily follows, but, if it should, we are of the opinion that the consequences contemplated would result from the arbitrary manner by which plaintiff has divided its road into five-cent zones for regulating the amount of its charges, and for these reasons we think it ought not to be heard to complain."

The railway company feels that it should not be subjected to any adverse criticism because of its adop-

tion of the zone system of rates. It is hardly fair to speak of this zone system as an arbitrary manner of dividing a railway line for regulating its charges. It is quite usual for suburban and interurban railway companies to adopt this system and it does not work any injustice to any one. Nor is it quite fair to say that the necessity of making equivalent reductions along the entire line to Oregon City will be due to this zone system. The rates of fare to the several stations along the same line of railway necessarily have an intimate relation to each other. If the fare to the Oak Grove group of stations is to be reduced from fifteen cents to ten cents, it will be absolutely impossible and, in fact, it would be improper for the railway company to continue to charge twenty cents to the group of stations immediately south of this Oak Grove group. The people who live in this twenty-cent group are entitled to a fare which does not exceed the fare to the Oak Grove group by more than five cents. If the fares were not regulated according to the zone system, the fares to stations in the twenty-cent group would have to be correspondingly reduced because of the reduction of the fare to the Oak Grove group of stations from fifteen cents to ten cents, even though the reduction to each of these stations in this twenty-cent group might not be five cents. The principle involved would be the same even if the zone system were not continued.

At the present time a passenger can travel from Oregon City to any one of the stations in the Oak Grove group for ten cents, and if the rate from Portland to the Oak Grove group is reduced to ten cents, it would be useless for the railway company to continue a twenty-five-cent rate from Oregon City. The reason for this is that a passenger coming from Oregon City to Portland would buy a ticket to Oak Grove for ten cents and then buy another ticket from Oak Grove

to Portland for another ten cents, making his entire ride cost him twenty cents. There is no escape from the conclusion that all of the rates on the Oregon City division are necessarily affected by these orders of the Commission.

The railway company's Exhibit No. 17 shows that during the year 1907 there were 682,569 cash fares collected on the Oregon City division. If each one of these fares should be reduced five cents, the loss of revenue to the railway company would amount to $34,128.45. These figures, of course, do not accurately represent the loss of revenue to the railway company, because of the fact that certain of these cash fares must necessarily have been paid for transportation between local stations and between points within the city of Portland, which will not be affected by the orders of the Commission, but the testimony shows there are but few local riders on the Oregon City division and that practically all the fares represent through transportation to or from First and Alder Streets. It is undoubtedly true that the loss of revenue to the railway company from these reduced fares, although it would not amount to as much as $34,128.45, would amount to a very large percentage of that figure. In this figure of $34,128.45 no note is taken of the reduction of two cents in the 127,453 commutation fares between Milwaukie and Portland; this loss, as set forth above, amounting to $2,549.06. It is also reasonable to suppose that if the cash fares between First and Alder Streets and the several points on the Oregon City division are to be reduced five cents, the passengers would expect a reduction in the commutation tickets from points on this division farther south than Milwaukie, and the railway company would feel obliged to make some such reduction, which would mean an additional loss of revenue. If we assume that the anual loss in revenue to the railway company, which will result from these or-

ders would amount to $25,000, the net earnings will be reduced from $153,826.09 to $128,826.09, which is less than four and a half per cent. upon the value of the railway lines, and if a depreciation charge of five per cent. is deducted a deficit will be shown.

In the foregoing discussion no account has been taken of the bonded debt of the Oregon Water Power and Railway Company. It appears from the testimony of Mr. Huggins (Milw. Rec., p. 189, et seq.), that the Portland Railway, Light and Power Company acquired the property of the Oregon Water Power and Railway Company subject to a bonded debt of $4,431,000, which bears interest at the rate of six per cent. and was assumed by the Portland Railway, Light and Power Company. The mortgage securing these bonds constitutes a lien not only on the 95.53 miles of railway of the Oregon Water Power and Railway Company, but also on its water power plant and other property. The total taxes upon the property of the Oregon Water Power and Railway Company for the year 1907 amounted to $37,000, of which $25,241.16 was charged to the railway property. If we divide the bonded debt in the same proportion, it appears that the amount chargeable to the railway lines of the Oregon Water Power and Railway Company amounts to $3,021,942, on which interest at six per cent amounts to $181,316.52. The net earnings of $153,826.09 under the old rates without any allowance for depreciation were not sufficient by over $25,000 to pay the interest on these bonds.

There is another way of looking at this matter which leads to the same conclusion. Under the statutes of the State of Oregon and under its franchises from the city of Portland, the railway company is entitled to charge all of the passengers to Milwaukie and to other points on the Oregon City division five cents for transportation within the city of Portland. The

real force and effect of the five-cent fare to Milwaukie which is prescribed by the order of the Commission entered in the Milwaukie case is to require the railway company to carry passengers from the city boundary lines at Golf Junction to Milwaukie for nothing. If the railway company is entitled to charge these same passengers five cents for transportation from First and Alder Streets to Golf Junction, the result of the five-cent fare to Milwaukie is that the railway company receives nothing for transporting them from Golf Junction to Milwaukie. The same is true when the transportation is the other way, that is, from Milwaukie to First and Alder Streets.

It seems to follow necessarily from all that has been said above that these orders of the Commission are confiscatory and on that account unconstitutional, invalid and void.

VIII.

THESE ORDERS OF THE COMMISSION ARE UNREASONABLE, ARBITRARY AND UNJUST.

The question whether a rate is a reasonable one or arbitrary and unjust is a question for judicial consideration. In Chicago, Milwaukee & St. Paul R. R. Co. vs. State of Minnesota, 134 U. S. 418, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus in substance and effect of

the property itself, without due process of law and in violation of the Constitution of the United States."

To the same effect are the following:

Chicago, &c., R. R. Co. vs. Wellman, 143 U. S. 339;
St. Louis, &c. R. R. Co. vs. Gill, 156 U. S. 648;
Smyth vs. Ames, 169 U. S. 469.

There has never been any proper judicial investigation into the reasonableness of the rates prescribed by these orders of the Commission. The Supreme Court of Oregon has upheld the Commission's orders solely upon the basis that the rates prescribed by the orders were justified by the voluntary rates adopted by the railway company for the Lents and other districts. The court should not have adopted these voluntary rates as any measure of proper rates for Milwaukie and the Oak Grove group of stations. The several rates should have been considered with reference to the particular facts and circumstances surrounding transportation to each point.

We believe we have established the fact that the old rates were not unjustly discriminatory. If that is true, the orders reducing them, based as has been shown, upon the alleged unjust discrimination, must necessarily be unreasonable, arbitrary and unjust and, therefore, unconstitutional, invalid and void. If, however, we admit for the purposes of the argument that unjust discrimination has been established, that admitted fact would not justify these orders, provided the railway company can show that, independent of any question of unjust discrimination, the rates prescribed by the orders are confiscatory, unreasonable, arbitrary or unjust.

We have just considered the question whether these orders are confiscatory and we have considered them separately from that standpoint because of the fact that rate regulations which do not allow public carriers to earn a fair and proper return upon the value of their property invested in serving the public have been so frequently attacked on this ground. As part of this particular question attention is called to the suggestion made above in considering whether these rates are confiscatory or not, to wit, that, as the necessary result of the orders, the railway company is required to carry a great many passengers between the city line at Golf Junction and Milwaukie for no compensation whatever. Any order which has this effect must necessarily be unreasonable, arbitrary and unjust.

These orders are open to attack, not only because of their confiscatory character, but also because for other reasons they are unreasonable, arbitrary and unjust. This conclusion necessarily follows from the findings of fact both in the Milwaukie case and in the Oak Grove case (Findings of fact of Circ. Ct., Milw. Rec., p. 37, Oak Grove Rec., p. 35; adopted by Sup. Ct., Milw. Rec., p. 253, Oak Grove Rec., p. 166), to the effect that the old rates which were reduced by the Commission's orders were reasonable rates. The orders of the Commission cut the Milwaukie rate in half and reduced the old fifteen-cent rates to the Oak Grove group of stations to ten cents. If these old rates were reasonable rates, the orders of the Commission reducing them fifty per cent. and thirty-three and one-third per cent. respectively, were unreasonable orders. The reduced rates cannot be justified by comparison with the rate to Lents or the rate to any other point. They are unreasonable, arbitrary and unjust upon the face of the record, for if a ten-cent rate to a particular point is a reasonable rate, a five-cent rate to the same

point must be an unreasonable rate and, likewise, if a fifteen-cent rate is a reasonable rate to a certain point, a ten-cent rate to that same point must necessarily be an unreasonable rate.

The rates prescribed by these orders discriminate against the people living at points on the Oregon City division farther south than the Oak Grove group of stations. All of the rates on the Oregon City division are so intimately connected with each other that it is arbitrary, unreasonable and unjust for the Railroad Commission to reduce the rates to Milwaukie and the Oak Grove group of stations without making some corresponding provision in regard to the rates to be charged to passengers traveling from and to other stations on this same division. If the Railroad Commission desired to correct the rates to Milwaukie and to the Oak Grove group of stations, on the ground that they were unjustly discriminatory, the Commission should have considered the rates to all of the stations on the Oregon City division and should have put into force and effect a complete schedule of rates for that division, as it was authorized and entitled to do under the provisions of the act of 1907. This partial regulation of rates on this division is unreasonable and discriminates against the people living at the stations farther south than the Oak Grove group.

The rates prescribed by these orders of the Commission also discriminate against people living on other divisions of the railway company's system equally distant from First and Alder Streets or from the city boundary line. The reasonable and proper manner for the Railroad Commission to regulate the rates of fare of the railway company is to consider the schedule of rates as a whole and to adjust them with proper reference to each other. Any partial regulation in the way of prescribing rates for a few of the stations without taking into consideration the rates to

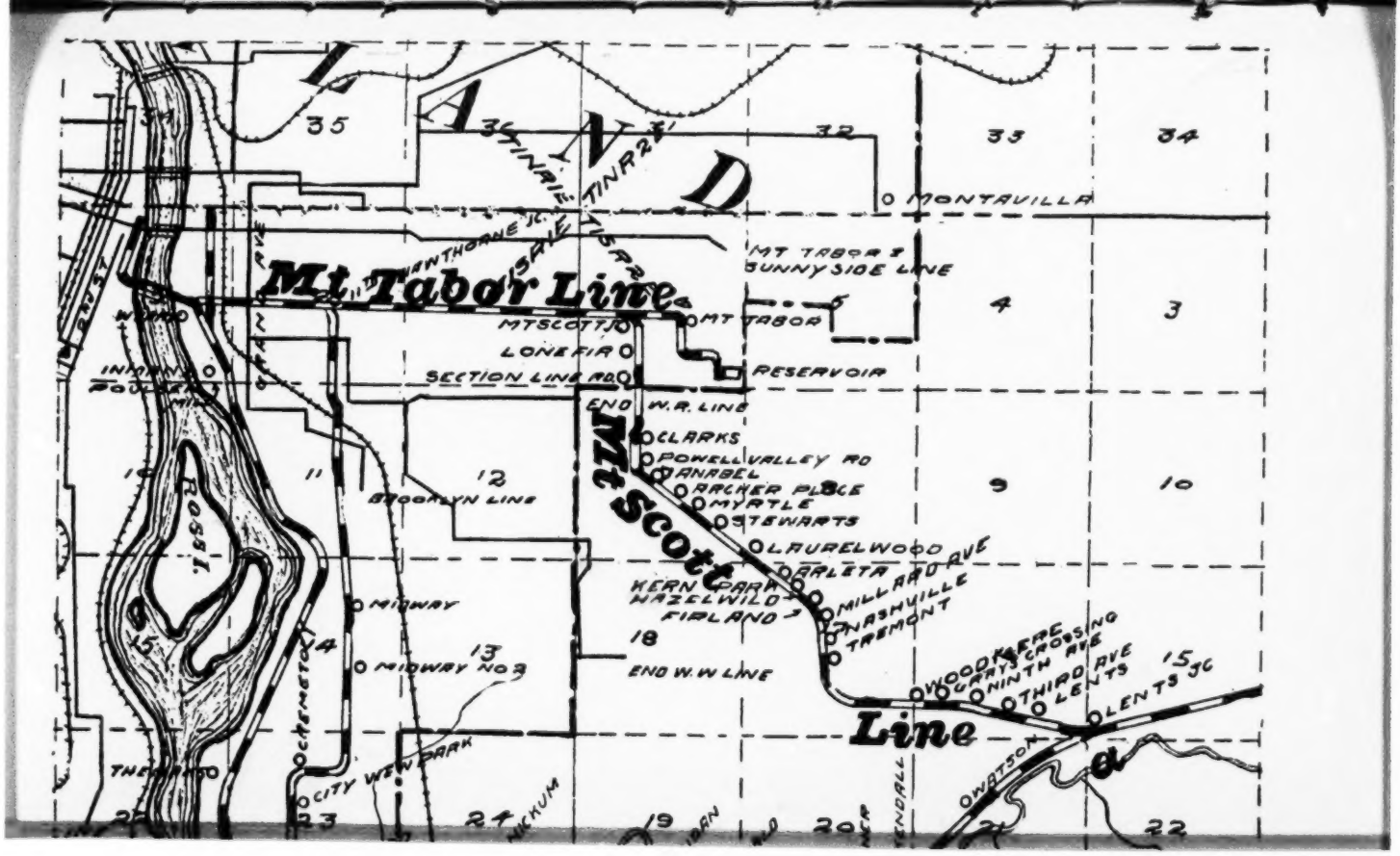
other stations, not only on the same division, but on all of the divisions of the system, necessarily requires the railway company to discriminate against some of its patrons. Any such partial rate regulation must necessarily be unreasonable, arbitrary, unjust and discriminatory.

The rates prescribed by these orders of the Commission are also discriminatory when considered in relation to the rates charged by other railroad and railway companies operating in the neighborhood. The following is a schedule showing the charges per mile which these orders of the Commission require the railway company to put into force and effect for transportation to Milwaukie and the Oak Grove group of stations:

Portland	to Milwaukie	6.71	miles	$0.007½
"	Milwaukie Heights	7.7	"	.013
"	Oak Grove	8.48	"	.012
"	Center	8.68	"	.011½
"	Risley	9.26	"	.011

The railway company's Exhibit No. 4 shows the rates of fare on the Oregon Electric Railway Company system and shows that that company charges on an average three cents a mile. This Oregon Electric Railway Company operates in very much the same manner as the railway company and in very similar territory.

The railway company's Exhibit No. 9 shows the rates of fare on the Southern Pacific Railroad Company, the Oregon Railroad and Navigation Company and the Northern Pacific Railroad Company. All of these companies charge three cents a mile. The railway company's Exhibit No. 6 shows that the rates on the Carvallis and Eastern Railroad Company are four cents a mile and the same is true on the Seaside branch of the Astoria and Columbia River (railway company's Exhibit No. 6). The fare on the Southern Pacific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Mt. Tabor Line
Mt Scott Line
MONTAVILLA
MT TABOR & SUNNYSIDE LINE
MT TABOR
MT SCOTT JC
LONE FIR
RESERVOIR
SECTION LINE RD
END W.R. LINE
CLARKS
POWELL VALLEY RD
ANABEL
ARCHER PLACE
MYRTLE
STEWARTS
LAURELWOOD
ARLETA
KERN PARK
HAZELWILD
FIRLAND
MILLARD AVE
NASHVILLE
TREMONT
WOODSTOCK
BURRYS CROSSING
NINTH AVE
THIRD AVE
LENTS
LENTS JC
END W.W LINE
MIDWAY
MIDWAY NO 3
BROOKLYN LINE
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CITY VIEW PARK
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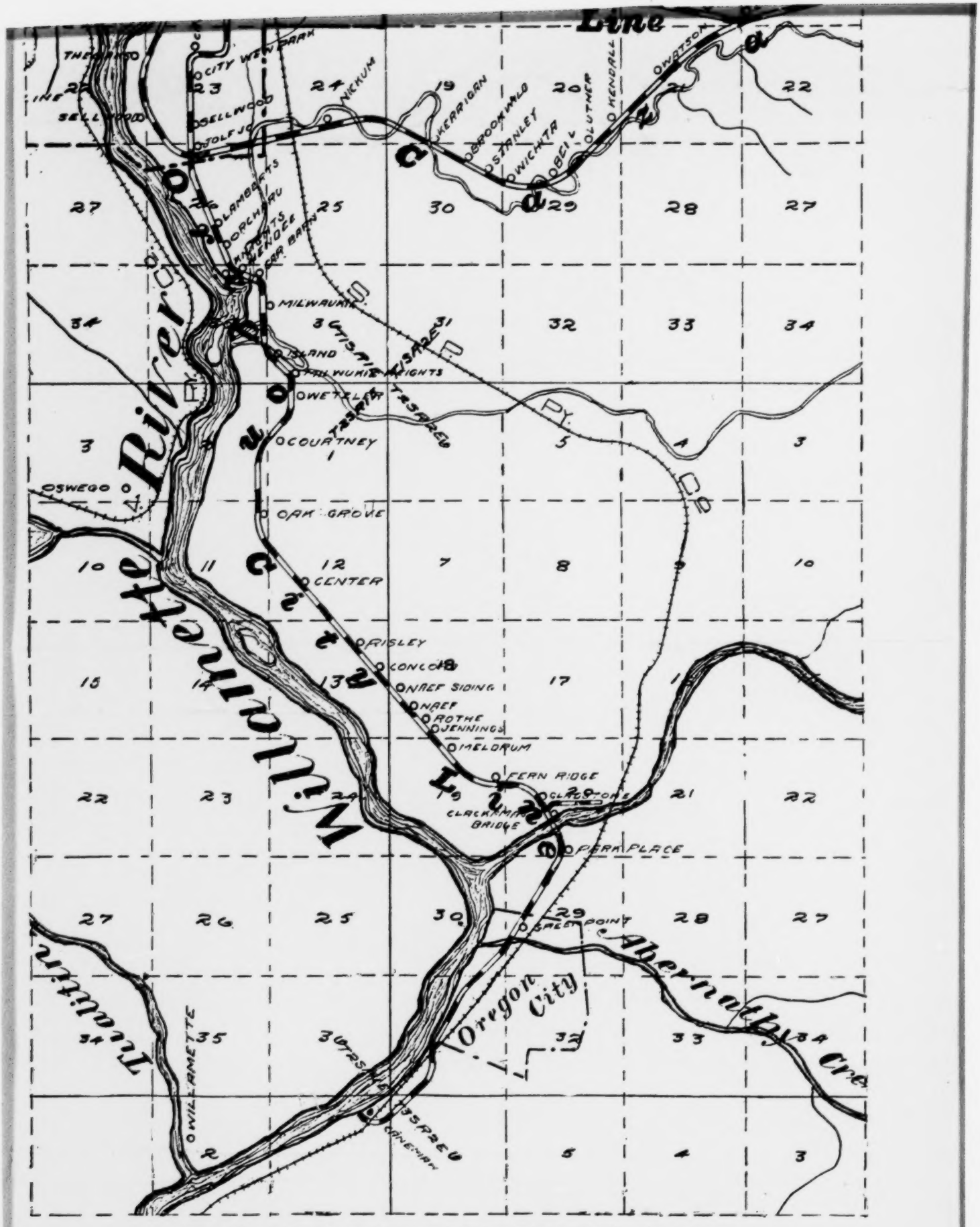

Part of Map of Railway Company's Lines Showing Points in Question.

road from Portland to Milwaukie is twenty-five cents. The distance is about the same as on the line of the railway company, where the old rate is ten cents and the rate prescribed by the Commission is five cents. The fare to Oregon City on the Southern Pacific line is fifty cents against the railway company's charge of twenty-five cents.

Any order of the Railroad Commission which requires a public carrier to discriminate against any of its patrons and any order which requires a public carrier to charge its passengers less than other public carriers are allowed to charge their passengers, where the transportation upon the several lines is carried on under substantially similar circumstances and conditions is unreasonable, arbitrary and unjust. In speaking of a similar situation in the case of Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission, 206 U. S. 1, Chief Justice White (then Mr. Justice White) said:

> "Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate, when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor, even if considering rates as a whole a reasonable return from the operation of its road might be received by the carrier."

In Lake Shore & M. S. R. R. Co. vs. Smith, 173 U. S. 684, a statute was under consideration which required all railroad companies operating within the state to sell at their principal ticket offices one-thousand-mile tickets at a specified reduced rate. The court held that this statute was discriminatory, unconstitutional and void. Mr. Justice Peckham said:

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

. . . . . .

"If this power exist it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

. . . . . .

"The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither

necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power."

IX.

CONCLUSION.

Alleged unjust discrimination lies at the basis of this controversy. It formed the real basis for the petitions filed with the Railroad Commission, in pursuance of which these orders were entered. It constituted the basis upon which the Commission acted in entering these orders. It was the reason for the refusal of the Circuit Court of Marion County to set the orders aside and the Supreme Court of the State of Oregon planted itself upon unjust discrimination as the basis for its decision. For these reasons we have discussed very fully the question whether any unjust discrimination is shown by the testimony taken in those cases. We believe that we have established the following propositions:

First.—That the existence of unjust discrimination is a question to be determined by judicial inquiry upon consideration of all the facts and circumstances;

Second.—That there has been no such judicial inquiry in this case, the court refusing to consider all of the facts and circumstances and basing its decision upon track mileage alone;

Third.—When all the facts and circumstances are given proper consideration no unjust discrimination has been shown to exist;

Fourth.—In the absence of unjust discrimination the orders are unreasonable, arbitrary and unjust and, therefore, unconstitutional, invalid and void.

We further considered the case upon the supposition that unjust discrimination has been shown to exist and upon that basis we believe we have further established the following propositions, to wit:

Fifth.—The existence of unjust discrimination is no excuse for the imposition of confiscatory, unreasonable, arbitrary, unjust or discriminatory rates;

Sixth.—The rates prescribed by these orders of the Commission are confiscatory;

Seventh.—The rates prescribed by these orders of the Commission are unreasonable, discriminatory, arbitrary and unjust.

We respectfully submit that the railway company is entitled to have these orders of the Railroad Commission of Oregon set aside and annulled on the ground that they are unconstitutional, invalid and void in that they deprive it of its property without due process of law and deny to it the equal protection of the laws.

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Attorneys for Portland Railway, Light & Power Company, Plaintiff in Error, and of Counsel.

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IN THE

Supreme Court of the United States.

October Term, 1912. No. 119.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1912. No. 120.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In the brief filed for the defendant in error several questions are discussed, to which the plaintiff in error desires to submit a reply, and particularly to the point set forth in the defendant in error's brief in the following heading, to wit:

"I.

"DEFENDANT IN ERROR CONTENDS THAT NO FEDERAL QUESTION WAS RAISED BY THE PLEADINGS, NOR NECESSARY TO THE DECISION, IN EITHER CASE INVOLVED IN THESE PROCEEDINGS, AND THEREFORE THIS COURT HAS NOT JURISDICTION TO REVIEW THE DECISIONS OF THE STATE COURT IN SAID CASES OR EITHER OF THEM, AND THE SAME SHOULD BE DISMISSED."

Under this heading the defendant in error argues that the plaintiff in error did not attempt to raise a Federal question until it filed its motion for a re-hearing in the Supreme Court of the State of Oregon, and that it was then too late to inject a Federal question into these cases. The decision on the petition for a re-hearing, the defendant in error contends expresses no more than would be implied by a simple denial of the motion.

ARGUMENT.

Since the two cases embraced in this proceeding involved the same question, they are, by the leave of the court, presented together and argued as one case. They were heard together and argued as one case in the Supreme Court of Oregon and accordingly but one petition for a re-hearing was filed with that court which by the caption and introductory paragraph thereof was expressly made applicable to both cases. (Milw. Rec., p. 254). We therefore deny the statement which appears on page 14 of the defendant in error's brief to the effect that no formal petition for a re-hearing was filed in the Oak Grove case. That the Supreme Court of Oregon considered the petition applied to both cases is conclusively shown by the opinion of the Supreme Court of Oregon denying the petition, from which we quote as follows:

> "It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City."

Federal Questions Were Presented in Bill of Complaint.

The plaintiff in error does not admit that no Federal question was raised by the pleadings, but, on the contrary, Federal questions were raised by the bills of complaint in both cases, were considered by the Oregon courts and have been in the case from the very beginning. The bill of complaint in the Milwaukie case contains the following:

> "XXIII.
>
> "That the distance on said 'Oregon City division' between said Golf Junction and said town of

Milwaukie is 1.35 miles and that in and by the said order of the said defendant, plaintiff is required and commanded to transport persons traveling as passengers over said 1.35 miles of plaintiff's said railroad for no compensation whatsoever, which action of said defendant this plaintiff alleges to be unjust, unreasonable and unlawful and not within the power of said defendant under the terms and provisions of said chapter 53 of the General Laws of Oregon, Session 1907.

"XXIV.

"That the rates, fares and charges to be charged and collected by this plaintiff for the transportation of passengers between the points described in the said order of the defendant, fixed in said order, are unreasonable and unlawful and that if permitted to go into effect would deprive plaintiff of a just and reasonable or any net profit or return upon the transportation of passengers traveling over the portions of said plaintiff's railroad affected by said order of said defendant, and that the regulations and practice prescribed and fixed in said order of said defendant to be followed and observed by this plaintiff, are and each of them are unreasonable.

"XXVI.

"That to permit the said order and decision of the said defendant to go into effect would unjustly and seriously impair the revenues of this plaintiff and would result in great and irreparable damage and injury to this plaintiff."

Paragraphs XXIII and XXV of the bill of complaint in the Oak Grove case are identical with Paragraphs XXIV and XXVI of the bill of complaint in the Milwaukie case. These paragraphs quoted from the bill of complaint clearly set forth questions arising under the Constitution of the United States. The matter of the sufficiency of the rates and the reasonableness of the orders was argued at length before the

Supreme Court of Oregon and a large part of the brief for the plaintiff and appellant in that case is devoted to a discussion of these questions.

Federal Questions Were Passed Upon by Supreme Court of Oregon in its Original Opinion.

The Supreme Court of Oregon in its original opinion in the Milwaukie case referred to these Federal questions in the following language:

> "The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system.
>
> "Quite an array of figures are set forth in the brief of plaintiff's counsel, and facts are stated therein in support of the contention that the rate of transportation and the privileges prescribed in the order and decree complained of will not furnish a reasonable return upon the capital invested, and that the maintenance of the existing fares is necessary to supply such recompense, that neither the defendant nor the court can speculate as to the probable effect upon the plaintiff's business or upon the consequences of any change in the population or in the value of property in the affected district, and that, if any reduction is proper, an arbitrary diminution of fifty per cent. as to Milwaukie is excessive, unjust and unreasonable. We do not think it necessary to discuss either of these questions; for the plaintiff, having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division an equal distance beyond the boundaries of the city of Portland."

Federal Question First Presented in Petition for Rehearing and Passed Upon Gives Jurisdiction.

Even supposing that the Federal questions had not been presented prior to the filing of the petition for a re-hearing, they were clearly and specifically raised in that petition and were passed upon by the Supreme Court of Oregon in its opinion delivered upon rehearing, as will be shown at a later point in this brief, and under the decisions of the Supreme Court of the United States this is sufficient to give jurisdiction on writ of error. This is settled by a long line of cases, a few of which will be briefly referred to.

In Mallett vs. N. C., 181 U. S. 589, which reviewed a decision of the Supreme Court of North Carolina reversing a judgment in a criminal case, Mr. Justice Shiras, in delivering the opinion of the court, said (p. 592):

> "Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.
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> . . . . . .
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> "But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.
>
> "It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion

had been filed, but before it had been certified down, the defendants filed a petition for re-argument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a re-hearing in the Supreme Court of a State after that court has pronounced its final decision. Loeber vs. Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 Sup. Ct. Rep. 934; Sayward vs. Denny, 158 U. S. 183, 39 L. Ed. 942, 15 Sup. Ct. Rep. 768; Pim vs. St. Louis, 165 U. S. 273, 41 L. Ed. 714, 17 Sup. Ct. Rep. 322.

"But those were cases in which the Supreme Court of the State refused the petition for a re-hearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. State vs. Mallett, 125 N. C. 718, 34 S. E. 651. Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

One of the Federal questions dealt with by the State Supreme Court in the Mallett case was that the statute in question was *ex post facto* and in violation of article 1, section 10, of the Constitution of the United States, and in considering that question this court continued, and quoted the opinion of the State court, as follows (p. 593):

"The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

> "'The next exception in the petition is that at the time of the commission of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no "vested rights" in the remedies and methods of procedure in trials for crime. They cannot be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the State, in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the eastern district criminal court (chapter 471, Laws 1899) was ratified March 6, 1899.'"

The second contention of plaintiffs in error in the Mallett case involving a question dealt with by the State Supreme Court as a Federal question was, in the words of this court (pp. 597, 598):

> "that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western, District of the State."

The opinion of the Supreme Court briefly disposing of this question was as follows (125 N. C. 718, 34 S. E. 651):

"The petition further urges that it is a discrimination, because the act creating the Western District criminal court fails to give the State the right of appeal. We do not see how such omission injures the defendants. The State has control of its own legislation, as to the cases in which it will permit appeals in its own behalf in its courts. Hurtado vs. California, 110 U. S. 516, 28 L. Ed. 232."

In Illinois Central R. R. Co. of the State of Illinois vs. Com. of Kentucky, 218 U. S. 551, Mr. Justice Hughes, in delivering the opinion of the court, said (pp. 555, 556):

"The Commonwealth of Kentucky recovered judgment in this suit against the Illinois Central Railroad Company, for the amount of the tax, for the year 1897, upon the franchise formerly belonging to the Chesapeake, Ohio & Southwestern Railroad Company. The recovery was based upon the fact that the Illinois Central Railroad Company was, at the time to which the tax related, in possession of the railroad, and was operating it under a power of attorney from the purchaser at a judicial sale, and had made the report which was required by the statute relating to the taxation of franchises. The judgment was affirmed by the Court of Appeals of Kentucky, 128 Ky. 268, 108 S. W. 245. The Illinois Central Company petitioned for a re-hearing, and presented the Federal questions now urged under the Fourteenth Amendment of the Constitution of the United States. The court entertained the petition and extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the State court passed upon the Federal questions, this court has jurisdiction. Mallett vs. North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leigh vs. Green, 193 U. S. 85, 48 L. Ed. 626, 24 Sup. Ct. Rep. 390."

In the above case the Court of Appeals of Kentucky dismissed the questions raised under the Constitution of the United States very briefly. The following is all of the opinion delivered on re-hearing in that case:

> "Hobson, J.: No right of appellant under the Fourteenth Amendment to the Constitution of the United States is violated by the decision. As shown by the opinions of the court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other taxpayers than railroads were taxed, and, if some railroads escaped, it is no reason that others should go free while all taxpayers of other classes paid their taxes. If any railroads escaped, they are still liable for their taxes unless barred by limitation. When the board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made, its action was final and the legal effect of its action must depend on what they did, and not on the secret intentions of the auditor.
>
> "The petition for re-hearing is overruled, but the opinion is extended as above indicated."

In Kentucky Union Co. vs. Com. of Kentucky, 219 U. S. 139, brought to this court upon writs of error to the Court of Appeals of the State of Kentucky, and involving the constitutionality of an act of the legislature of the State, Mr. Justice Day, in delivering the opinion of the court, said (p. 158):

> "No mention appears to have been made of the Federal Constitution in this connection until petition for a re-hearing, when it was objected that the statute, in providing for the sale of the forfeited title, furnished no means of identification or description of the land to be sold, nor for such an ascertainment of the holdings of occupying claimants as would enable a purchaser to know what was being offered for sale; and it was urged that a judicial sale in pursuance of such a proceeding

would be no less than a sacrifice of the defendant's property, and that such an order would violate the due process of law secured by the Constitution.

"In the opinion upon the petition for a rehearing, the Court of Appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the Fourteenth Amendment. The court having thus considered the Federal question, the objection is open here."

See also

Forbes et al. vs. State Council of Va., etc., 216 U. S. 396;

McCorquodale vs. State of Texas, 211 U. S. 432;

The defendant in error on page 16 of its brief cites the case of Fullerton vs. Texas, 196 U. S. 192, as authority for the proposition that the certificate of the judge of the State Supreme Court that a Federal question was decided is not sufficient to give the Supreme Court of the United States jurisdiction. This point decided in that case has no bearing on the case before the court because in the Fullerton case the record showed that no Federal question had been passed upon by the Supreme Court of the State. The distinction between that case and the case now before this court was well brought out by the paragraph of the opinion in the Fullerton case which immediately precedes the language of that opinion quoted by the defendant in error. The paragraph referred to reads as follows:

"We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision, although, if the State court entertains the petition, and disposes of the Federal question, that will be sufficient. Mallett vs. North Carolina, 181 U. S. 589,

45 L. Ed. 1015, 21 Sup. Ct. Rep. 730. In that case it was observed: 'Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action.' ''

Federal Questions Were Raised in Petition for Rehearing.

That the railway company in its petition for a rehearing presented to the Supreme Court of the State of Oregon the Federal questions arising under the Fourteenth Amendment of the Constitution of the United States now presented to this Court may be shown best by quoting in part from the petition, wherein the railway company urged as the grounds thereof the following (Milw. Rec., Case 119, p. 254):

> "That the order of the respondent in this cause made under and pursuant to the provisions of the said chapter 53 of the General Laws of Oregon for the year 1907 is in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States in that the enforcement of the said order of respondent would deprive this appellant of its property without due process of law and would deny this appellant the equal protection of the laws.
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> . . . . . .
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> "*The Railroad Commission Act, the orders of the Commission and the decisions of the court are in violation of section 1 of Article XIV of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.*
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> . . . . . .
>
> "In determining the question of unjust discrimination, the court has held in effect, that only the circumstances of relative mileage from the corporate limits of the city of Portland need be con-

sidered by the Commission. If such be the effect of the Railroad Commission Act, then we submit that such provision of the law is repugnant to the Fourteenth Amendment of the Constitution of the United States insuring to all persons the equal protection of the laws.

"Appellant has invested its money, has constructed its railways and is engaged in operating them as a common carrier and depending upon the law to permit it to receive a reasonable compensation for the services rendered by it to the public. The equal protection of the law comprehends that the appellant shall be permitted to enjoy a reasonable compensation for the services rendered by it to the public and it can be deprived of this right to a reasonable compensation only as a consequence of its wrongful act depriving it of its right to invoke the protection of the organic law.

"The legislature of the State is without power to enact any law that will in its operation deny any person the equal protection of the laws or authorize the taking of the property of any person without due process of law. Under the construction of the Railroad Commission Act by this court the appellant is required to operate its railway and provide its service to the public traveling thereon at an admitted loss without having been shown to be guilty of a wrongful act which would operate to deprive it of its constitutional right to equal protection.

"It was said by the Supreme Court of the United States in the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362-410:

> " 'The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain.'

"The decision of the court is in effect that at the time of trial Lents was 3.50 miles outside of the corporate limits of the city of Portland and that appellant having established a five-cent fare between Portland and Lents should be held to a limit of five cents for the transportation of pas-

sengers on any other lines of its railway extending 3.50 miles, or less, beyond the corporate limits of the city. If the Railroad Commission Act had contained an express provision to this effect, we apprehend that such provision could not be enforced if it were shown that the carriage of passengers to points 3½ miles beyond the city boundaries in any direction for a fare of five cents was impossible of performance by reason of the cost of such service in most of such instances being greater than the rate allowed by law.

"Under the construction of the Railroad Commission Act by this court, this appellant is deprived of the right to construct and operate any lines of railway outside of the corporate limits of the city of Portland, a distance of 3.50 miles, or less, except upon condition that this appellant shall establish upon such lines a uniform fare of five cents. Such rule, however, under the decision of this court, would not apply to any other railway company constructing or operating such lines of railway from points within to points without the corporate limits of the city of Portland, and would leave such other railway companies free to charge a reasonable compensation for the services to be rendered by them. This is the logical effect of the rule announced by this court limiting the consideration of the respondent to relative mileage and operates to deny to this appellant the equal right with others to reasonable compensation for its services.

. . . . . .

"Notwithstanding the provisions of section 59, quoted by this court as authorizing the consideration of discriminations between localities which was not expressly conferred by the terms of the act, the court has seen fit to apply a limited and restricted construction to the term 'like and contemporaneous service' so as to deprive the appellant of due consideration of all of those circumstances and conditions naturally and usually entering into the making of rates. Thus, the court has refused to consider as justifying any differ-

ence in fares between Lents and Nickum on the one hand and Milwaukie on the other, the points raised in appellant's brief and established by the evidence in this case as follows:

I.

"That the cost of constructing the Mount Scott division was fifty per cent. less per mile than the cost of constructing that portion of the Oregon City division between Milwaukie and First and Alder Streets, thereby rendering a smaller investment necessary to handle the traffic on the Mount Scott division than on the Oregon City division.

II.

"That on the Mount Scott division the line runs through a thickly settled portion of the city of Portland for fifty-six blocks and cares for local business within the city limits, while on the Oregon City division there is no local business worth mentioning upon the 5.36 miles of the Oregon City division from Golf Links to First and Alder Streets.

III.

"That the Mount Scott division is practically a city line having all the advantages of short riders and that a great majority of the passengers on the Mount Scott division do not actually ride more than one-half of the entire distance possible to ride thereon for five cents, while on the Oregon City division ninety to ninety-five per cent. of all passengers between Portland and Milwaukie ride the entire distance between the terminal at First and Alder Streets and the town of Milwaukie.

IV.

"That a very small portion of the traffic on the Mount Scott division arises at the distance limit of the five-cent fare and that ninety per cent. of the traffic on the Mount Scott division originates at points nearer the said terminal at First and Alder Streets than the five-cent limit at Lents, while on the Oregon City division practically no

traffic arises at any point nearer than Milwaukie to said terminal at First and Alder Streets, and that outward bound travel on said Oregon City division is practically all to and beyond Milwaukie.

V.

"That the volume of travel on the Oregon City division between Milwaukie and all points north of Milwaukie is less than one-twentieth of the number of passengers carried by appellant upon its Mount Scott division.

. . . . . .

"A failure or refusal to consider all of the dissimilar circumstances and conditions which may render a preference in one instance reasonable and in another unreasonable, deprives the appellant of the right to have determined the character of its act alleged to be wrongful and without the establishment of such act as wrongful, it cannot be deprived of equal protection of the laws.

. . . . . .

"The Commission in this case has made a rule extending the five-cent fare to a point beyond that fixed by general law and applicable only to a particular point. The rule is not general in its application to all railway companies and in itself constitutes a discrimination against this appellant which is in violation of the Federal Constitution insuring the equal protection of the laws.

. . . . . .

"The Supreme Court of the United States in the case of Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., page 697, said:

> "'What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely

as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.'

"The provision insuring to all persons the equal protection of the laws is violated by any statute or act of a commission acting for the legislature which does not make the rule uniformly applicable to all persons under similar circumstances and conditions. Tinsley vs. Anderson, 171 U. S. 101-106.

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The Rates Established by the Commission are Confiscatory.

"The record discloses that for the year 1907 the net earnings from operation of appellant's railroad, amounted to $153,826.09, and that the fixed charges, interest on $3,000,000.00, representing the actual cost of appellant's railroad, amounted to $180,000.00, leaving a deficit of more than $26,000.00 to which should be added a reasonable amount for depreciation of the railroad and equipment, and it has been shown that the depreciation of electrical railway equipment is very considerable.

"It is claimed by the respondent that the effect of the enforcement of the reduced rates of fare to Milwaukie and the Oak Grove group of stations, would reduce appellant's earnings by not more than $7500.00 per annum, but in this computation the respondent has wholly disregarded the effect of said reduced fares upon the great bulk of traffic on appellant's Oregon City division. The court will remember that Milwaukie and the Oak Grove group of stations are along the line of railway extending from Portland to Oregon City and known as the Oregon City division. The volume of travel between Portland and Milwaukie and be-

tween Portland and Oak Grove is insignificant when compared with traffic of the entire division. Under the present system of fares on the Oregon City division, the appellant charges a cash fare of twenty-five cents, which fare is made up of five five-cent zones between First and Alder Streets in Portland, and Oregon City. The Oak Grove group of stations is in the fifteen-cent zone and the fare from the Oak Grove group southerly to Oregon City is but ten cents. It would naturally follow that if the orders of the Commission should be placed in effect, that appellant would be required to reduce its fare five cents on all business of the Oregon City division either arising within the territory directly affected by the orders of the Commission, or arising in the territory south of the Oak Grove group of stations. Passengers boarding our cars at Oregon City, for instance, would be permitted to pay a fare of ten cents to the station of Risley and then, by virtue of the order of the Commission, pay an additional ten cents from Risley in to the Portland terminal.

"The record discloses that during the year 1907 there were carried on the Oregon City division approximately 800,000 passengers paying a fare of ten cents or more. As we have shown that the reduction in fare required by the orders of the Commission would affect all of this business, it is apparent that the loss upon the Oregon City division, based upon the 1907 capacity business, would be upwards of $40,000.00, which loss should be added to the deficit above mentioned.

"The court has said that the net revenue from the entire system of railways is the fund from which dividends are paid. It is conceded that appellant should be permitted a reasonable net earning upon its invested capital and it has been shown beyond any question that not only is the appellant unable to make any net earning under present conditions, but that by the enforcement of these orders of the Commission, its annual deficit would be greatly increased and the date upon which dividends might be declared from net reve-

nue postponed until such a time that only our posterity could have any interest in it.

. . . . . .

"The Commission has no power to require appellant to issue transfers to passengers from Milwaukie and Oak Grove for transportation over the lines of Portland Railway Company.

. . . . . .

"We feel that the orders of the Commission, if enforced, would result in great and irreparable injury to the appellant and would violate the rights of the appellant, which we believe to be guaranteed to it by the Constitutions of the United States and of the State of Oregon. . . ."

Federal Questions Were Considered and Passed Upon Adversely to Plaintiff in Error by Supreme Court of Oregon.

That the Supreme Court of the State of Oregon entertained the petition for a re-hearing and considered and passed upon the Federal questions raised and decided them adversely to the plaintiff in error, the party invoking their protection, may be shown best by quoting from the opinion of the State Supreme Court passing upon the petition for a re-hearing. The State court said (56 Ore. 485, 109 Pac. Rep. 273, Milw. Rec., p. 281):

"Plaintiff has presented an elaborate petition for re-hearing, amounting practically to a re-argument of the whole case. The broad position is taken that the Railroad Commission Act, the orders of the Commission, and the decisions of the court, are in violation of section 1, article 14, of the Constitution of the United States, prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. **We have carefully considered the able argument of counsel in support of this contention,**

but find ourselves unable to assent to their conclusions. The several principles of law stated in the argument are undoubtedly sound, and not to be questioned, but in applying the reasons of the law to the facts of the case we fail to fully agree with counsel. The principles are that a corporation is a person within the meaning of the Fourteenth Amendment, which forbids the State to deny to any person within its jurisdiction the equal protection of the laws, and prohibits the taking of property without due process of law; **that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstituional denial of the equal protection of the laws; that a corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it; and that the requirements of the Fourteenth Amendment apply both to privileges conferred and liabilities imposed, and no greater burdens should be imposed upon one than are laid upon others in the same calling and condition.''**

The foregoing is a clear statement by the Supreme Court of Oregon that it has carefully considered the constitutional questions raised by the appellant and has decided the case contrary to the appellant's contentions. We quote further from the opinion on re-hearing as follows:

''Upon the other question, the discrimination as to the amount of fare charged the respective communities by plaintiff, we are not entirely free from doubt as to the proper remedy. **It was said in the main opinion that 'the ten-cent fare between Portland and Milwaukie is not unreasonable when compared with the charges made by other railway companies for similar service.' Using that statement as a premise for an argument, it is urged in the motion that such statement is a finding that the**

specified rate is per se reasonable, which giving effect to the constitutional guaranties heretofore noted, precludes the State or its agent from making any reduction.''

Here again the court clearly states one of the constitutional points raised by the appellant but fails to sufficiently answer the point in the opinion which proceeds as follows:

> ''But it was stated in immediate connection with that remark that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory.' 'The fact that a rate is per se reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at section 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness per se of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by law, would be in and of itself unjust and unreasonable. Beale and Wyman, section 838.''

The foregoing is a quotation of the only language of the opinion where the court specifically mentioned the points arising under the Constitution of the United States, but that the court had these points in mind is indicated by the following quotations from the opinion on re-hearing, to wit:

"Plaintiff justifies the lower charge to and from Lents to the terminus in the city of Portland, first, on the ground that it is prevented from charging each passenger more than five cents fare, because of the alleged contract between its predecessor and the former owner of that portion of the road extending between Lents and Hawthorne Avenue. But this arises from the wrongful act of the plaintiff and its predecessor; that is, it had no lawful right or power, as was held in the main opinion, to thus bind the State or restrict it in its future regulation of fares. On account, however, of the forfeiture clause of this contract, it was doubtless considered by the Commission that to order plaintiff to increase the rate of its fare at Lents in order to avoid the discrimination complained of would cause it to hazard a greater loss than to lower the rate of fare at Milwaukie. It therefore chose the latter, and under the circumstances of the case we think it was justified in so doing, inasmuch as the foregoing clause of the contract expires by limitation on April 30, 1911, after which time plaintiff will be free to act upon its own judgment in the premises, and so to arrange its schedule of fares as to avoid any just complaint of discrimination.

"Plaintiff's second justification of the discrimination is that the cost of the construction of the line to Lents is fifty per cent. less than that of the line to Milwaukie, and in this connection it is also alleged that the agreement with plaintiff's predecessor to make a rate of fare not exceeding five cents to the people of Lents is based upon a consideration, being the value of the road bed conveyed to plaintiff's predecessor in consideration of that agreement, but the right of one locality is not thereby increased, nor is the equal right of a competing locality diminished by municipal or other subscriptions advanced for the building of the road. Beale and Wyman, section 839.

"It is also complained that the reduction of the rate from ten to five cents at Milwaukie and from fifteen to ten cents at Oak Grove will entail

upon plaintiff a considerable loss by compelling it to make equivalent reductions along the entire line to Oregon City. We do not think this necessarily follows, but, if it should, we are of the opinion that the consequences contemplated would result from the arbitrary manner by which plaintiff has divided its road into five-cent zones for regulating the amount of its charges, and for these reasons we think it ought not to be heard to complain.

. . . . . .

"The motion therefore will be denied."

Certificate of Chief Justice as to Federal Questions.

In both cases the Chief Justice of the Supreme Court of the State of Oregon made the following certificate as to Federal questions involved (Milw. Rec., p. 294; Oak Grove Rec., p. 177):

"IN THE SUPREME COURT OF THE STATE OF OREGON.

Portland Railway, Light and Power Company, a Corporation,

Plaintiff (Appellant),

VS.

Railroad Commission of Oregon,

Defendant (Respondent).

CERTIFICATE.

I hereby certify that in the above-entitled cause wherein Portland Railway, Light and Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent and the question before the above-entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the thirtieth day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway, Light and Power Company claims that said order as amended deprived it of its property without due process of law and that it violated the obligation of a contract in which said Portland Railway, Light

and Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the Constitution of the United States of America, and that the decision of the above-entitled court was against said Portland Railway, Light and Power Company and said constitutional questions claimed by said Portland Railway, Light and Power Company and that such decision was necessary to the decree rendered in the above-entitled cause.

Dated the thirteenth day of June, 1910.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon."

Federal questions having been duly raised in the Supreme Court of the State of Oregon and by that court considered and decided against the party invoking their protection, this court has jurisdiction to review the questions presented, upon authority of section 709 of the United States Revised Statutes, which provides as follows:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision if in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity

specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed. (See section 1017.)

"The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

This section of the Revised Statutes is referred to on page 11 of the brief filed on behalf of the defendant in error in the following language:

"Neither do the cases at bar come within the provision of section 709 of the United States Revised Statutes providing review by this court of the decisions of the highest courts of the State in suits 'where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held by, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.'"

It will be noticed that attention is called in this quotation to one clause only of section 709 of the Revised Statutes, and that clause is not the particular clause which applies to this case. We do not find any reference to the other clauses of section 709 at any point of the brief filed for the defendant in error.

Additional Points.

There are several other points mentioned in the brief filed on behalf of the defendant in error to which we think the attention of the court should be called.

1. On page 5 of that brief the following statement is made:

> "The towns of Milwaukie and Lents and the Milwaukie and Lents districts are contiguous to and in sight of each other."

The location of these two towns and the two lines of railway running to them respectively are shown on the map which appears as P. R. L. & P. Exhibit No. 1, a section of which has been reproduced and is attached to the brief heretofore filed for the plaintiff in error. That map shows that these two towns are fully five miles apart and that the two lines of railway run through different territories.

2. On page 7 of the brief filed on behalf of the defendant in error the following appears:

> "The general ground of complaint against plaintiff in error in the Oak Grove case (No. 120) is that it charges on the Oregon City division between Oak Grove, Courtney, Center and Risley and First and Alder Streets, fifteen cents without transfer privileges in Portland, while charging on the Springwater division between First and Alder Streets and Nickum five cents; Kerrigan, Bell, Lents, Lents Junction, Gilbert and Gates ten cents, and Jenne fifteen cents, all with transfer privileges, while the respective difference in distance between the respective places on the Springwater division is 3.91 miles greater than the places taking the same fare on the Oregon City division; that a reasonable rate from Oak Grove, Courtney, Center and Risley to First and Alder Streets in either direction is ten cents with transfer privileges."

The court will remember that the Mount Scott division and the Springwater division join at the station known as Lents Junction. Lents Junction is distant 8.31 miles from First and Alder Streets by the Mount Scott division, but on the Springwater division the distance from Lents Junction to First and Alder Streets is 10.71 miles. By reason of the five-cent fare established to Lents on the Mount Scott division the plaintiff in error is required to fix a new group for five cents increase in fare from Lents easterly to Lents Junction on the Mount Scott division and then easterly on the Springwater division, and, in order to make such five cents increase serve a group of stations covering approximately an equal distance to that in the five-cent groups on plaintiff's other lines of railways, plaintiff in error is required to transport passengers from Lents to Gates on the Springwater division, a distance of 2.27 miles, for an additional fare of five cents, making the total fare from First and Alder Streets to Gates by way of the Mount Scott division ten cents. Thus it became necessary that the railway company fix and establish the same rate of ten cents from First and Alder Streets to Gates by way of the Springwater division, as both lines start from a common terminus and reach the same objective, although the distance traveled by passengers on the Springwater division is 2.4 miles greater than the distance by way of the Mount Scott division. At Gates on the Springwater division the rates of fare again change from ten cents to fifteen cents and the fifteen-cent fare then covers the distance of 2.05 miles from Gates to Jenne, which is approximately the same distance in track mileage included in each five-cent zone on the Oregon City division. We repeat, the greater distance passengers are permitted to travel on the Springwater division for a fifteen-cent fare is due first to the five-cent fare to Lents and secondly to the fact that the Mount Scott division and the

Springwater division serve the same points by different routes, and, therefore, no greater charge can be made a passenger upon the longer route than upon the shorter.

In comparing, from a distance standpoint, the fare to Jenne with that to Risley in the Oak Grove group, the distance being respectively 14.43 miles and 9.26 miles from First and Alder Streets, two allowances should be made in determining whether or not there is any unjust discrimination.

First.—The five-cent limit on the Mount Scott division is 7.69 miles from First and Alder Streets. The city boundary constituting the five-cent fare limit on the Oregon City division is 5.36 miles from First and Alder Streets. Here we have a difference in the length of ride for 5 cents of 2.33 miles due to the dissimilar conditions fully set forth in the brief heretofore filed on behalf of the plaintiff in error. To this 2.33 miles should be added 2.40 miles, the difference in length of the two routes (Springwater and Mount Scott) to Lents Junction. Deducting the said two allowances, aggregating 4.73 miles from the 14.43 miles separating First and Alder Streets from Jenne, we find that for the purpose of determining discrimination from a distance standpoint, the distance to Jenne should be treated as 9.70 miles as against 9.26 miles to Risley, on the Oregon City division. Clearly there is not here a sufficient difference upon which to base a charge of unjust discrimination. Putting the same proposition in another way, the distance from Jenne to the five-cent limit at Lents on the Mount Scott division is 4.32 miles; the distance from Risley to the five-cent fare limit at Golf Junction on the Oregon City division is 3.90 miles, so that, as a matter of fact, the passenger from Jenne paying a ten-cent fare to Lents rides only .42 of a mile further than the passenger from Risley

paying a ten-cent fare to Golf Junction. Such slight differences as these in the very nature of the case must exist, as it is impossible to arbitrarily locate all stations upon the different divisions of railroads at exactly the same distances one from another. There must be some point on the line at which the fare will change and it is clearly shown that the railway company has, so far as possible, made the distances within every fare group approximately the same.

3. On pages 19 to 24 inclusive of the brief filed for defendant in error certain statements are made to which attention should be called. At the bottom of page 19 the following appears:

> "No question being presented by the issues as to the adequacy of the returns of the company as a whole no ground is presented for reviewing the orders of the Commission as to the particular rates involved herein."

A particular issue has been presented relating to the returns of the company upon all of the railroad lines owned and operated by it, being all of the lines known as the Oregon Water Power lines. The only other property owned at that time by the plaintiff in error was certain stocks of other corporations. The income derived from these stocks was not taken into consideration, for it has no bearing upon the issues involved in these cases.

Much stress is laid on page 22 of the great difficulty of analyzing the company's returns because of its widely diversified occupations. The only fact to which this statement can properly apply is the division of the general expense account of the company, twenty per cent. only of which was charged against the Oregon Water Power railway lines. There is nothing in the record to show that this division of the general expense account was not an entirely rea-

sonable and proper division and under any circumstances the amount thus charged represents a very small part only of the operating expenses charged against these railway lines. In the brief heretofore filed on behalf of the plaintiff in error the figures taken from the exhibits filed in these cases have been set forth which show accurately and intelligently the earnings and operating expenses of all of these Oregon Water Power lines of railway.

On page 21 of the brief filed on behalf of defendant in error the following appears:

> "The 'draw-back checks' issued by the company since the order of injunction, about a year, pursuant to its terms, show about $4,000 a year or even less involved."

There is nothing in the testimony to show that this is the fact and it is not an accurate statement and we object to the action of counsel for defendant in error in inserting this statement in their brief.

On page 23 a statement of Book Cost, Debt and Capital Stock appears. No reference is made to any exhibit from which this statement is taken. We have not available copies of all of the exhibits, but we have no recollection of any exhibit which shows these figures. If they do not appear in any of the exhibits which have been filed we object to the action of counsel for defendant in error in presenting them and we respectfully submit that they should be disregarded by the court. Immediately following these statements on page 23 the net income from the operations of the Oregon Water Power system is said to amount, according to the company's books, to $203,484.63 and that that is seven per cent. upon the value of the Oregon Water Power system, which is placed at $2,859,900, being $30,000 per mile for 95.33 miles (the real mileage being 95.53 miles). This value of the Oregon Water Power

railway lines, to wit: $2,859,900, is approximately correct, the error being caused by the small difference in mileage mentioned above, but the other figure of net income derived from the operations of the Oregon Water Power system is not in accordance with the testimony. The testimony shows that the net operating income instead of being $203,-484.63 is $153,826.98 (see Railway Company's Exhibit No. 16). The book cost of the Oregon Water Power lines given in the statement which appears on page 23 is $7,704,476.62 and must include the cost of certain very expensive hydro-electric plants, transmission lines and other property separate and distinct from its railway lines constructed or acquired by the Oregon Water Power Company before it transferred these railway lines and other property to the plaintiff in error.

At the top of page 24 certain other figures are given which do not appear in the testimony. They or some of them were no doubt taken from reports which have been issued by the plaintiff in error, but they include income derived by the plaintiff in error from its assets other than the Oregon Water Power railway lines which alone are involved in these cases and on that account these figures are not pertinent to any issue presented. If we turn back to page 22 we find a statement relating to the rates of the plaintiff in error on its Oregon City division since the decision of this case in the Supreme Court of Oregon. There is nothing in the testimony on this point and we object to any statement in regard to it.

4. On page 27 of the brief filed for defendant in error we find the following:

> "(e) Eliminating incompetent testimony, the most satisfactory testimony in the cases before the court as to comparisons with other rates, is

> the tariff of appellant's own charges on other lines. This was considered by the Commission and State courts, and is one of the principal factors of the lower court's findings, that the existing rates are unreasonable."

The lower court did not find that the existing rates are unreasonable in the general and ordinary acceptation of that word. It did find that the old rates were unjustly discriminatory, and on that account, were unreasonable and should be reduced. Finding of fact No. 16 (Milwaukie Record, No. 119, page 37) states that the evidence does not show that the rates are unreasonable. It is fair to assume from this finding of fact that the old rates in consideration of the service rendered were reasonable rates. If we assume for the purposes of the argument that the plaintiff in error owned and operated the Oregon City division of the Oregon Water Power lines but did not own and operate the line to Lents or any other of the Oregon Water Power lines, and further assume that the line to Lents and these other Oregon Water Power lines were owned and operated by a separate and distinct corporation there would be no basis whatever for the reduction of these old rates to Milwaukie and to other points on the Oregon City division on the ground that they were unjust or unreasonable or on any other ground. The basis of the Commission's orders reducing the rates and the decisions of the Circuit Court and Supreme Court of Oregon sustaining the orders is the alleged unjust discrimination.

We desire to call the attention of the court to the construction and interpretation of the Oregon statute adopted and approved by the Oregon Supreme Court. It holds that the statute authorizes the railroad commission to determine an issue of unjust discrimination in the matter of rates without considering any facts and circumstances therein other than track mileage.

These other facts and circumstances might sufficiently and satisfactorily explain the discrimination in rates and show that it was not unjust discrimination. If the statute provides that the commission is authorized to confine its attention in an issue of this character to track mileage alone and that the decision of the Supreme Court of the State upon the validity of any such order of the Commission is final and not subject to review by this court the statute itself must be declared unconstitutional and void for the reason that it deprives the company, whose rates are involved, of due process of law, and denies to it the equal protection of the laws.

All of which is respectfully submitted.

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Nos. 119 and 120

In the Supreme Court of the United States

October Term, 1912

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
Plaintiff in Error,

v.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

AND

PORTLAND RAILWAY LIGHT AND POWER COMPANY,
Plaintiff in Error,

v.

RAILROAD COMMISSION OF OREGON,
Defendant in Error.

Brief on Behalf of Defendant in Error

Writ of Error to Supreme Court of the State of Oregon.

STATEMENT

Two cases are embraced in this brief, known as the Milwaukie and Oak Grove Cases. The legal principles involved being almost identical and the facts similar, by stipulation both cases were tried together in the state courts and are briefed together for this court. The opinions of the State Supreme Court are found in 56 Ore. 468, and 57 Ore. 126.

The proceedings were instituted before the defendant in error by the Town of Milwaukie by filing its complaint with said commission

(Transcript of record herein, case 119, page 50),

and by the Oak Grove Improvement Association, by filing its complaint with said commission on the 15th day of August, 1907.

(Transcript of record, case 120, page 49),

The proceedings were instituted in each case to have the Railroad Commission declare (a) existing interurban passenger charges between Portland and Milwaukie, and between Portland and Oak Grove, to be unreasonable and unjust, and to have the commission fix and order reasonable rates substituted therefor. (b) To have the commission find and declare existing charges to be unjustly discriminatory and to fix and order substituted therefor rates not discriminatory. After full hearing and argument before the commission, on the 30th day of January, 1908, orders were made by the commission substantially as prayed in the said complaints.

(Transcript of record No. 119, Milwaukie Case, pages 60-63.)
(Transcript of record No. 120, Oak Grove Case, pages 68-71.)

Before those orders became effective plaintiff in error herein commenced original suits in equity in the Circuit Court for Marion County against the defendant in error to vacate said order. A preliminary injunction was allowed, upon terms, in each case and the rates fixed by the commission, defendant in error, have never been in effect. Although nearly six years have elapsed since the orders were made by the commission, the rates established therein have never been put into force and their

operation has been stayed all that time by successive appeals from one tribunal to another. There has never been a test of the results of the rates ordered by their being put into effect.

A full hearing was had before the Circuit Court for Marion County, Oregon. By stipulation all the testimony taken before the commission in both cases was considered in the consolidated cases in the Circuit Court. Additional testimony being taken before the Circuit Court, that court, as required by statute, stayed its proceedings and certified the cases back to the commission for reconsideration. Upon such reconsideration the commission modified its rulings in certain particulars, but adhered to the orders made.

(Transcript of record No. 119, Milwaukie Case, pages 64-65.)
(Transcript of record No. 120, Oak Grove Case, pages 72-73.)

Under the statute the amended findings and orders took the place of the originals, and were duly affirmed by the Circuit Court by decree dated June 22, 1908. The amended orders of the Railroad Commission were adjudged and decreed to be in all things and respects reasonable and in accordance with law and in full legal force and effect, and plaintiff therein, plaintiff in error herein, was adjudged and decreed in all matters, things and transactions affected thereby to obey the same in all the terms and conditions and in accordance with the intent and spirit thereof. Said decree and amendments are found in,

(Transcript of record No. 119, Milwaukie Case, pages 39-43.)
(Transcript of record No. 120, Oak Grove Case, pages 37-43.)

The Portland Railway Light and Power Company is a domestic corporation (first paragraph of complaint, transcript of record, page 2), and all of its business involved herein is intrastate, although its business is diversified as indicated by its name; it furnishes light and power in a number of cities as well as operating street and interurban railroads.

When the case was tried in the state courts and before the Oregon Railroad Commission, the plaintiff in error railroad company owned and operated the system of suburban and interurban railroads formerly known as the "Oregon Water Power" system. The western terminus of the various divisions of this line was First and Alder Streets in the City of Portland. All the lines or divisions run from the city outward across the Madison Street Bridge, on the same track for about one mile to Water Street. There the "Oregon City" and "Springwater" divisions branch off and run over the same track along the Willamette River up stream to Golf Junction, on the southern boundary of the City of Portland and the Clackamas County line, 5.36 miles from First and Alder Streets. The "Oaks" cars also use this line to the Oaks during a part of the year. From Golf Junction the *Oregon City Division* runs southward through *Milwaukie, Oak Grove,* Courtney, Center, Risley, through Oregon City to Canemah, about one mile south of Oregon City. The *Springwater Division* extends from Golf Junction eastward and thence southward through Nickum, Lents Junction, Gates, Sycamore and Jenne on to Cazadero, Clackamas County. The *Mt. Scott Division* runs from the Water Street junction east along Hawthorne Avenue to Lents, 7.7 miles from First and Alder Streets, and thence on to Lents Junction, .62 miles further, where it joins the Springwater division. Lents is 2.75 miles outside the city limits of Portland.

Sellwood Line.—This line extends from Twelfth Street and Hawthorne Avenue south to Golf Junction. Cars run

over this line from Milwaukie to First and Alder Streets, two every 45 minutes, and one car runs from Oregon City via Oak Grove, Milwaukie, Golf Junction and the river line every 45 minutes.

Troutdale Division.—This line is a branch from Linneman, on the Springwater division, to Fairview and Troutdale.

St. Johns Line.—This line runs from its terminus on Second and Alder Streets in Portland northward across the Willamette River to the City of St. Johns in Multnomah County. It was formerly owned under the name of Portland Railway Company, the stock of which was held by the plaintiff in error, which company took over the legal title during the pendency of these suits in the state courts.

Plaintiff in error also owns and operates as a part of its system the business formerly conducted by Portland General Electric Company, in selling electric light and power in Oregon City, Milwaukie, St. Johns, Portland, Salem, Woodburn, Silverton and elsewhere, illuminating gas in Salem and a street railway in the latter city.

The Town of Milwaukie and Lents and the Milwaukie and Lents districts are contiguous to and in sight of each other. Milwaukie is a highly improved little city; most of her citizens work in Portland and travel back and forth to the city daily. The same may be said in a somewhat lessened degree of the Oak Grove district, which lies just south of the Milwaukie district. The orders in question affect only the rates of fares on the Oregon City line except as Milwaukie passengers use the Sellwood line as an alternative route. The only fares affected by the order and decree in No. 119

(Abstract of record, pages 41-42)

are those between Milwaukie and First and Alder Streets in the City of Portland in either direction. These were

reduced from ten to five cents, and it was ordered and decreed that passengers be accorded the same transfer privileges that are accorded to passengers traveling between Lents and First and Alder Streets in either direction.

(Abstract of record No. 119, page 42.)

The only fares affected in case No. 120 are those between Milwaukie Heigths, Courtney, Oak Grove, Center and Risley and First and Alder Streets. These were reduced from fifteen to ten cents, and it was ordered the same transfer privileges be given from such points that are accorded passengers traveling between Lents and First and Alder Streets.

(Record case 120, page 41.)

The general ground of complaint before the Railroad Commission in the Milwaukie case (No. 119) was that since May 13, 1901, the plaintiff in error and its predecessors, carried and still carry passengers from Lents on its Mt. Scott division to First and Alder Streets in Portland, a distance of 7.69 miles, and from Nickum on the Springwater division to same point, 6.51 miles, for five cents with transfer privileges in each case, while charging and collecting from the citizens of Milwaukie, traveling between Milwaukie and First and Alder Streets in Portland, a distance of 6.71 miles, the sum of ten cents without transfer privileges.

From the city limits of Portland, Lents is 2.75 miles distant, Nickum 3000 feet and Milwaukie 1.35 miles. The foregoing difference in fares and transfer privileges was claimed to be an unjust discrimination and an undue preference against the town and citizens of Milwaukie and the Milwaukie district, and in favor of the citizens of Lents and Nickum and the Lents and Nickum districts. It was also alleged that a reasonable fare between Milwaukie and First and Alder Streets in either direction with transfer privileges was five cents.

The general ground of complaint against plaintiff in error in the Oak Grove case (No. 120) is that it charges on the Oregon City division between Oak Grove, Courtney, Center and Risley and First and Alder Streets, fifteen cents without transfer privileges in Portland, while charging on the Springwater division between First and Alder Streets and Nickum five cents; Kerrigan, Bell, Lents, Lents Junction, Gilbert and Gates ten cents, and Jenne fifteen cents, all with transfer privileges, while the respective difference in distance between the respective places on the Springwater division is 3.91 miles greater than the places taking the same fare on the Oregon City division; that a reasonable rate from Oak Grove, Courtney, Center and Risley to First and Alder Streets in either dircetion is ten cents with transfer privileges.

In each case it was alleged that this difference in fares and transfer privileges was an unjust discrimination and an undue preference against the said towns and the inhabitants of these localities on the Oregon City division and in favor of the said towns and inhabitants thereof on the Springwater and Mt. Scott divisions and was greatly injurious to the said towns, people and localities on the Oregon City division. That all the said towns and localities are suburbs of the City of Portland, and a keen rivalry exists between the citizens of these places in obtaining cheap transportation and in building up and increasing the population of their respective towns, stations and districts, and the land values and commercial interests thereof, and that this unjust discrimination and undue preference has built up the said districts, stations and towns and increased the land values thereof on the Mt. Scott and Springwater divisions, while the towns, districts and localities, population, land values, etc., on the Oregon City division have remained the same and become stagnant.

The defense offered by the plaintiff in error before the Railroad Commission for such discrimination and undue preference is: (a) That it is bound by a contract made by its predecessors with the Chicago and Mt. Scott Railroad

Company to give the inhabitants of the Lents district a five cent fare and that it is thereby compelled to make Lents, a distance of 2.75 miles outside of the city limits of Portland on the Mt. Scott division, the basis of its fare outside of the City of Portland on the Mt. Scott and Springwater divisions instead of the city limits of Portland, which are the natural and legal basis of appellant's rate making, on account of the law making an arbitrary fare of five cents to persons traveling to any point within the city limits. (b) That the defendant in error has no jurisdiction to consider discrimination between localities in adjusting rates. (c) That the circumstances and conditions for a like and contemporaneous service must be the same and that in the cases at bar they are dissimilar.

The cases present the following questions:

1. Whether a Federal question is involved.

2. The reasonableness of the rates ordered by the Railroad Commission of Oregon and decreed by the Oregon court to be reasonable as compared with other charges of the company.

3. Whether the present rates are unjustly discriminatory and preferential against the Milwaukie and Oak Grove districts, and against the inhabitants thereof.

The discrimination being admitted and justification thereof attempted, the question arises as to whether the "Lents Contract," difference in population, cost of road, etc., prevent such discrimination from being unjust.

The Lents contract is set forth in transcript of record herein,

(Milwaukie Case No. 119, pages 80-82.)
(Oak Grove Case No. 120, pages 161-162.)

If the rates ordered by the commission are reasonable, and its action lawful, the question of discrimination becomes immaterial. On the other hand, if the findings of the commission as affirmed and decreed by the state courts, of unjust discrimination are correct, and the proper remedy applied, then the question of the reasonableness of rates becomes immaterial. If the commission is within the law in either finding, the state court should be affirmed. This court will not reverse the cases unless the commission and state courts are in error on both propositions.

No issues of the confiscation of property of plaintiff in error or of deprivation of property without due process of law are tendered in the complaint, nor are such issues involved in either case. The only real issue tried was the attempted justification under the Lents contract and by reason of alleged dissimilar conditions.

(Transcript of record, Case 119, pages 3 to 12 inclusive.)

(Transcript of record, Case 120, pages 2 to 12, inclusive.)

ARGUMENT

I.

DEFENDANT IN ERROR CONTENDS THAT NO FEDERAL QUESTION WAS RAISED BY THE PLEADINGS, NOR NECESSARY TO THE DECISION, IN EITHER CASE INVOLVED IN THESE PROCEEDINGS, AND THEREFORE THIS COURT HAS NOT JURISDICTION TO REVIEW THE DECISIONS OF THE STATE COURT IN SAID CASES OR EITHER OF THEM, AND THE SAME SHOULD BE DISMISSED.

Simkins, in Federal Equity Suit (2d ed.), page 135, under the heading "What is a Federal Question?" says: "A case presents a federal question when it becomes necessary to construe the constitution, laws, or treaties of the

United States in order to reach a correct decision of the material issues, or to decide as to the existence of some right, title, privilege, claim or immunity asserted under the federal constitution and laws, or when plaintiff relies upon them in whole or in part for a recovery." After citing numerous cases the author continues:

"It may be stated in another form, thus: The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the constitution or laws, or sustained by a contrary construction."

The rule is supported, and, we might say, adduced from the following cases, some of which are cited by the author just quoted.

Starin v. New York, 115 U. S. 248, 256-7.
Cooke v. Avery, 147 U. S. 375, 348-5.

The author (Simkins, page 136) also quotes from Judge Shiras' Equity Practice, as follows:

"Judge Shiras, in his Equity Practice, page 17, says the jurisdiction in the phrase, 'Cases arising under the constitution, laws and treaties made,' etc., is divided into two classes.

"First. Where the cause of action springs directly from some provision of the Federal laws, as when the right claimed is directly given by Federal law, or where the cause of action arises out of some act of a Federal officer, based on Federal law, as in cases of United States marshals. This is designated as jurisdiction direct and primary.

"Second. When causes of action are based on or supported by the laws of the state thought to be in conflict with some right, duty, power, or franchise created or conferred by the constitution of the United States, or its laws and treaties. This may be designated as derivative, or secondary, jurisdiction."

All parties interested in these suits are residents of Oregon, and no question involving a construction of the federal constitution, statutes or treaties is alleged in the

complaint, and a case which may be brought in a federal court or which may be removable from a state court, must in fact involve a controversy, the determination of which depends on the construction of the federal law.

New Orleans v. Benjamin, 153 U. S. 411, 424, 431.

Neither do the cases at bar come within the provision of Sec. 709 of the U. S. Revised Statutes providing review by this court of the decisions of the highest courts of the state in suits "where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held by, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority."

Carson v. Dunham, 121 U. S. 421 (7 S. C. R. 1030).

When the facts only are in dispute no federal question is involved.

Myrtle v. Nevada, C. & O. Ry. Co., 137 Fed. 193-195.

Nor when the federal question is unnecessary to the decision.

Parmelee v. Lawrence, 11 Wallace 36-38.
Railroad Company v. Rock, 4 Wallace 177-180.

A brief synopsis of the bill of complaint in the light of the foreging authorities discloses no issues giving this court jurisdiction. Nothing is claimed by plaintiff in error arising out of any title, right, commission or authority under the federal constitution, statutes or treaties. The complaint (Milwaukie case No. 119) contains 28 paragraphs, the substance of each follows:

1. Sets forth that plaintiff in error is an Oregon corporation, and mentions some of the properties it controls and operates, all being within this state.

2. Sets forth the rates it charges.

3. Sets forth divisions into which its system, as far as involved in these suits, is divided.

4. That under Sec. 2096, B. & C. Ann. Codes and Stat. of Oregon (2207 L. O. L.), it is prohibited from charging more than five cents per passenger in the City of Portland.

5. That it charges 25 cents from Portland to Oregon City, 14.47 miles.

6, 7, 8 and 10. Relate to fares. Shows differences.

9. Alleges conditions are dissimilar.

11. That track from Mt. Tabor Junction to Lents was acquired under an agreement not to charge more than five cents per passenger with transfer privileges. This is the "Lents Contract" before mentioned.

12, 13, 14, 15, 16, 17. Attempt to explain and justify rates—claiming them to be reasonable, but nothing is stated relative to value, maintenance, revenues, operating expenses, etc.

18, 19. Recite order of Railroad Commission and acknowledges service thereof.

20. Denies charges to be unreasonable or discriminatory, but alleges no facts.

21. Charges commission with ignoring facts and conditions in making orders, but makes charges in general terms, alleging no facts showing injury.

22. That rates from Milwaukie to First and Alder Streets were reasonable and afford only reasonable compensation for service performed.

23. That by said action plaintiff in error is compelled to carry passengers from the Town of Milwaukie 1.35 miles to Golf Junction without compensation and not within power of commission to so order. That Golf Junction is

within the city limits of Portland, where all fares must be not more than five cents under a state statute. Milwaukie is just outside (1.35 miles) and fares from Milwaukie were placed at five cents to First and Alder Streets. Hence the contention, although a part of the general system.

24. Charges that the rates fixed by the orders will deprive plaintiff in error of a just and reasonable compensation, or of any net profit or return upon the transportation of passengers traveling over the portions of said railroad affected by the orders, and hence the orders are unreasonable. (No facts are alleged to support or from which conclusions can be drawn.)

25. That commission exceeded its power in that it based its order on its own finding that rates charged by the plaintiff in error were unjustly discriminatory.

26. That to permit said order to go into effect would unjustly and seriously impair the revenues of plaintiff in error.

27. No adequate remedy at law.

28. Orders would result in irreparable damage.

Not a syllable appears in the bill of complaint to the effect that the above are confiscatory of the property of the plaintiff in error or that they in effect result in taking its property without due process or that it is denied equal protection of the law. Paragraph 23 of the complaint contained the only allegation which in any way remotely indicates that the order might be confiscatory, etc. It alleges:

"That the distance on said 'Oregon City Division' between said Golf Junction and said Town of Milwaukie is 1.35 miles, and that in and by said order of the said defendant, plaintiff is required and commanded to transport persons traveling as passengers over said 1.35 miles of plaintiff's said railroad for no compensation whatever, which action of said defendant this plaintiff alleges to be unjust,

unreasonable and not within the power of said defendant under the terms and provisions of said Chap. 53 of the general laws of Oregon, Session 1907." It will be observed that no facts are alleged to show that plaintiff is by said order, or either of them, required to carry passengers over said 1.35 miles without compensation or without reasonable compensation. It is true that said strip of road is in the city division and in that division because plaintiff alleges it was inconvenient for it to establish a station on the city boundary. Further, the small piece of track is a part of its entire system and located many miles from either terminus. The plaintiff could pick out a short piece of track between any two stations and make the same claim for it. The contention impresses us as being sublimely absurd and therefore we will discuss it no further.

It will be remembered that the plaintiff in error did not attempt to raise a federal question until it filed its motion for rehearing in the Supreme Court of the State of Oregon, in which motion it first presents the suggestion of being deprived of its property without due process of law, in violation of section 1 of the 14th amendment of the federal constitution, and that it is being denied equal protection of the law, and that the rates fixed by the commission are confiscatory. For petition for rehearing see transcript of record No. 119, Milwaukie case, pages 254-275. In No. 120 (Oak Grove case) no formal petition for rehearing was filed, but in the transcript of record, page 177, we find the following certificate by the Chief Justice of the Oregon Supreme Court, to-wit:

"I hereby certify that in the above entitled cause wherein Portland Railway, Light & Power Company is plaintiff and appellant, and Railroad Commission of Oregon is defendant and respondent, and the question before the above entitled court being the validity of that certain order of said Railroad Commission of Oregon dated the 30th day of January, 1908, as amended by its order of April 11, 1908, said Portland Railway, Light & Power Company claims that said order as amended deprived it of its property with-

out due process of law and that it violated the obligation of a contract in which said Portland Railway, Light & Power Company is interested, and that said order of said Railroad Commission of Oregon as amended was repugnant to the constitution of the United States of America, and that the decision of the above entitled court was against said Portland Railway, Light & Power Company and said constitutional question claimed by said Portland Railway, Light & Power Company and that such decision was necessary to the decree rendered in the above entitled cause.

Dated the 13th day of June, 1910.

Frank A. Moore,
Chief Justice of the Supreme Court of the State of Oregon."

Notwithstanding the statements of said certificate the record fails to show that any tender of the issues mentioned therein was made by plaintiff in error in the court below, or that such were decided or were necessary for a decision of either case.

Milwaukie Case (No. 119):

For Complaint, see Transcript of Record, pp. 2 to 12.
For Order of Commission, see Transcript of Record, p. 13.
For Answer, see Transcript of Record, p. 22.
For Decree Circuit Court, see Transcript of Record, pp. 39-43.
For Decree Supreme Court, see Transcript of Record, pp. 253-254.

Oak Grove Case (No. 120):

For Order of Commission, see Transcript of Record, pp. 13-16.
For Complaint, see Transcript of Record, pp. 2-12.
For Answer, see Transcript of Record, pp. 23-25.
For Decree Circuit Court, see Transcript of Record, pp. 37-41.
For Decree of Supreme Court, see Transcript of Record, pp. 166-167.

It is too late to raise a federal question after a decision in the highest court of a state on petition for rehearing, nor will the certificate of the Chief Justice be sufficient for that purpose when the record shows affirmatively that no federal question were raised by the pleadings, none decided and that none were necessarily involved in the decision of the case.

It cannot be disputed in the light of the decision of this court that plaintiff in error was too late in its effort to inject a federal question into these cases. The decision on the petition for a rehearing expresses no more than would be implied from a simple denial of the motion. The court in denying the motion does not discuss the question of due process, equal protection or confiscation, except to show that the same were not involved and were unnecessary to the decision, and that the decision rested mainly on unjust discrimination practiced by plaintiff in error and which was within the power of the commission to rectify by an order directed to the plaintiff.

Is the certificate of the judge that a federal question was decided sufficient? In Fullerton v. Texas, 196 U. S. 192, at pages 193 and 194, Chief Justice Fuller, writing the opinion of the court, says:

"Some weeks after the denial of the motion for a rehearing, this writ of error was allowed by the presiding judge of the Court of Criminal Appeals, who certified that on that motion it was contended 'that under the evidence in the cause plaintiff in error was engaged in intrastate commerce and commerce between different states within the meaning of Article 1, Section 8 of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision.' And further, 'that said contention was duly considered by us and decided adversely to plaintiff in error.'

"But on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional

question, in terms, because it was suggested too late, and nothing is more firmly established than that such a certificate cannot in itself confer jurisdiction on this court. Henkel v. Cincinnati, 177 U. S. 170; Dibble v. Bellingham Bay Land Company, 163 U. S. 63."

The state court in disposing of the motion for rehearing in the cases at bar did not consider the value of the properties of plaintiff in error. Original or reproductive value nor depreciation, their gross or net earnings, operating expenses, indebtedness, nor any fact which would tend to show that the railroad's property was being confiscated or that it was in any way being "deprived of its property without due process of law," or denied the equal protection of the law. Plaintiff in error tendered no such issue and presented no evidence on such a theory.

In the light of the decisions of this court we submit no federal question was raised in the state court, and none was decided or necessary to a decision of the issues, and that the writs of error in these cases should be dismissed.

II.

REASONABLENESS OF THE RATES ORDERED BY THE RAILROAD COMMISSION AND DECREED BY THE STATE COURT.

(a). The defendant in error contends that if the rates established by the commission are not so unreasonable as to amount to confiscation of the property of the plaintiff, or to deprive it of some right guaranteed it under the constitution of the United States, and there was a hearing at which substantial testimony was adduced which tends to support the findings of the commission, then the order of the commission will not be disturbed, either by this or any other court.

It will be borne in mind that there is no question raised as to the regularity of the proceedings below—that the commission acquired jurisdiction, conducted its hearings,

and made and served its orders in the manner prescribed by law.

The question of the scope of judicial review of rate making tribunals has been before this court so frequently within the last few years that it would seem that citations of this court's own holdings would be unnecessary. We take it that the law is now so well established by the decisions of this court that it need only be referred to: that courts have no authority to re-examine the findings of a rate making commission, such as the defendant in error, as to subjects properly within its jurisdiction, except for the purpose of determining whether the action of the commission was repugnant to the constitution, in excess of the statutory powers conferred upon it, or manifestly such an abuse of discretion as to be equivalent to an excess of authority, or based upon a mere shadow instead of substantial evidence.

U. S. v. Baltimore & Ohio Railroad Co., 32 Supreme Court Reporter, 817, 820.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547, and cases cited.

Interstate Commerce Commission v. Delaware, etc., 220 U. S. 235, 251.

There can be no question raised that the delegation of power by the Oregon Legislature to the defendant commission to apply the statutory rules laid down in the Railroad Commission Act to specific facts, such as fixing reasonable railroad rates, is an unconstitutional delegation of power, or unconstitutionally intermingles the powers of government. This question—purely one of construction of the state constitution—has been finally settled by the Supreme Court of Oregon in favor of the constitutionality of the Railroad Commission Act.

State v. Corvallis & Eastern Railroad Co., 59 Oregon 450, 454-5.

This ruling of the highest court of the State of Oregon as to the construction of its own constitution is binding upon this court.

(b) The Standard of Reasonableness is in the Whole Schedule.

These cases do not involve a whole schedule of rates—only a small number out of many maintained by the railroad are affected.

Particular rates fixed by legislature or commission may not be attacked without showing the body of rates as a whole does not bring in sufficient return to the carrier. The carrier's concern is as to the returns from the business as a whole, and not the adjustment of particular rates among themselves.

Wilcox v. Consolidated Gas Co., 29 Sup. Ct., 192 212 U. S. 19, 54.

Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257, 258.

Atlantic Coast Line v. North Carolina Corp. Comm., 206 U. S., 1, 24-25.

Gulf, C. & S. F. R. Co. v. R. R. Comm., 113 S. W. (Tex. Sup. Ct.), 741, 747.

The return on the whole schedule affords no light on the reasonableness of a particular rate.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S., 257.

Noyes, Amer. R. R. Rates, 25, 28-35.

Central Yellow Pine Assn. v. Ill. Cent. R. Co., 10 I. C. C. Rep., 505, 538-540; affirmed 206 U. S. 441.

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep., 224, 238.

No question being presented by the issues as to the adequacy of the returns of the company as a whole, no

ground is presented for reviewing the orders of the commission as to the particular rates involved herein.

(c) Decrease in Rates not neessarily followed by Diminution of Revenue.

There is no presumption of law appellant will be injured by the reduction of rates ordered by the commission. The courts will not interfere until there has been an actual, bona fide trial of the new rates. This has not been had in this case. Between five and six years have elapsed since the orders were made, and they have never been enforced a single day.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.
Mayor, etc., v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148.
Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339.
Central of Georgia R. Co. v. McLendon, 157 Fed. 961, 978.
Quimby v. Clyde S. S. Co., 12 I. C. C. Rep., 392, 396.
Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep., 224, 238.

The record shows a very substantial return to the company from the schedule as a whole, that fact is not in issue. The effect of the orders in question is problematical; in any event the loss in revenue to the company would be inconsiderable, and in all human probability the company's revenues would be increased by stimulation of business.

Wilcox v. Consolidated Gas Co., 29 Sup. Ct. 192, 199, 212 U. S. 19-42.

The record does not show the cost of the particular portion of road in question, nor is there sufficient in the record to permit any calculation as to the relative or actual cost of the service performed.

(d) The Rates Ordered by the Commission are in Fact Reasonable.

It should be borne in mind that the reasonableness of a particular rate involves the limit of reasonableness both as regards the company and as regards the public. (Beale and Wyman, R. R. Rate Regulation, Sec. 500.)

The schedule as a whole now yields a sufficient and very substantial return to the company.

The effect of the reduction is problematical. The vice-president and manager, Mr. Fuller, estimated that based on past business the reduction made by the order, directly would amount to $7,800 a year. (Transcript of record herein, page 176, case 119.) The "drawback checks" issued by the company since the order of injunction, about a year, and pursuant to its terms, show about $4,000 a year, or even less, involved. A hypothetical question was asked as to how much the reduction would be, assuming about 800,000 passengers traveled a year, and the company had its revenue cut five cents on each. (Transcript of record herein, page 160, case 119.) Not only was there no foundation for such a question, but it was in fact erroneous, even preposterous. (See cross-examination of Mr. Fuller, transcript of record, pages 173 to 176, case 119.) He said he had no figures to show the number of passengers who would be directly affected by the order. (Page 176.)

Nor is it certain that there will be any reduction in the company's net earnings. Says the Supreme Court in the Consolidated Gas case (29 Sup. Ct. 199):

"And again, increased consumption at a lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

"The elevated railroads in New York, when first built, charged 10 cents for each passenger; but, when the rate was reduced to 5 cents, it is common knowledge that their receipts were not cut in two, but that, from increased patronage, the earnings increased from year to year, and soon surpassed the highest sum ever received upon 10-cent rate.

"Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test."

Nor if a reduction were to be made on the whole business of the Oregon City line would the company's revenues be affected so seriously as to be confiscated. This statement is not made ill-advisedly, for the rates of the plaintiff in error on its Oregon City division have, since the decision below, been lined up to conform with those involved herein, and such rates have been in effect for a considerable time without attack.

We find difficulty in analyzing the company's returns, because it is engaged in widely diversified occupations and a very considerable portion of all its expense is general and common to all the businesses. It has arbitrarily assigned these general items in round figures, so much to the "General Electric" lines, so much to the "City" lines and so much to the "O. W. P." lines. (See transcript of record, pages 144, 145, case 119.) Without questioning the company's good faith, we submit that such a method of arbitrary division furnishes no safe guide for either the judicial or administrative mind and the element in doubt is so large that calculations based on it are worthless. It is like the surveyor who went out by day, paced or guessed his distances, and going home worked out the results by night to four decimal places. Contrast this "rule of thumb" method with the very scientific division made by the Wisconsin Commission in Buell v. C. M. & St. P. Ry. Co., 1 Wis. R. R. Comm. Rep. 508, and to the painstaking divisions of costs submitted in the various state rate cases now under submission in this court.

It has been strikingly pointed out by Prof. Robinson in Yale Law Review (see Railroad Age Gazette, p. 1148, Oct. 16, 1908) that a difference in the method of dividing these common expenses even as between freight and passenger traffic may determine whether the rates are confiscatory or not, according to the rule adopted. Much more is this the case when the assignment is between entirely distinct businesses conducted by a single management—electric light, power, city lines, interurban lines, ferry, gas and street car in one town, water power at another, retail electrical supplies—and is made not according to any fixed rule supposed to have any relation to relative cost, but merely as a matter of bookkeeping, 40 per cent to one department, 40 per cent to another and 20 per cent to another. The results are worthless for statistical analysis.

Even on their statement we find this:

YEAR ENDING JUNE 30, 1907.

Book cost of road, equipment, etc., to date (including only O. W. P. line)		$7,704,476.62
Six per cent mortgage bonds outstanding	$ 4,431,000.00	
Five per cent miscellaneous obligations outstanding	4,000,000.00	
Total funded debt	$ 8,431,000.00	
Excess of funded debt over cost		726,523.38
Capital stock	$15,000,000.00	

Mr. Fuller, vice-president of Portland Railway, Light & Power Company (transcript of record herein, p. 155, case 119), put the value at $30,000 for 95.33 miles, or $2,859,900 for the "O. W. P." system. He put the line from Golf Links to Milwaukie at $19,000 per mile, or $28,000 for the 1.69 miles. (Transcript of record, p. 165, case 119.) The net income from operations of the "O. W. P." system, according to the company's books, $203,484.63, was 7 per cent of the value. The net income of the company, after

paying operating expenses, interest on all above funded debt, taxes, and $46,415 "organization expense of Portland Railway, Light & Power Co.," was $605,265.66. Out of this it paid 5 per cent in quarterly dividends on $5,000,000 preferred stock, and had $355,340 to carry to its surplus account, or 3.55 per cent on the $10,000,000 of common stock. Not much like possible confiscation here because the State cut two cents off the Milwaukie fare and five cents from Oak Grove. The court below gave up trying to guess, and found that the evidence was not sufficient to show the value of the property used, nor of any division, nor the income, expenditures, or profits or loss, from any division of plaintiff's line, or the cost of transporting passengers. (Finding 17, page 37, transcript herein No. 119, Milwaukie case.) The situation is exactly as in the Cumberland Telephone Case (32 Sup. Ct. Rep. 741)—the whole question is "in the air."

Fortunately this court does not have to speculate or guess as to results, nor does it have to analyze the capitalization of the company, nor go into minute calculations based on insufficient data leading only to an unsatisfactory and inconclusive end. This court has pointed out the rule so clearly that its justice must be apparent to all:

"Where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts."

Willcox v. Consolidated Gas Co., *supra* (29 Sup. Ct. Rep. 192, 196), 212 U. S. 19-42.

"We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put in operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

Knoxville Water Case, 212 U. S. 17 (29 Sup. Ct. 148, 154).

The inquiry as to the reasonableness of the rates involves a consideration:

1. Of the value of the service to the passenger.

2. Of the cost of the particular service—which, as shown by Judge Noyes, can not be ascertained with our present means of accounting, and certainly has not been developed in this case.

3. Of the charges made for similar services by the same and other carriers.

I. C. C. v. Chi. Gt. Western Ry. Co., 141 Fed. 1003.

The Commission found that the existing charges of ten and fifteen cents respectively were unreasonable, and that reasonable charges would be five and ten cents.

The Circuit Court made the following finding:

"That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mount Scott divisions, the charges of the plaintiff for transportation of passengers between said First and Alder streets and the town of Milwaukie, are unjust and unreasonable."

Finding 16, Record, Case 119, p. 37.

This was a correct finding of fact. As said by the Supreme Court below (56 Ore. 488), "the question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service."

The question was considered by the Interstate Commerce Commission in connection with rates for carriage of shingles from Fredericton and Fort Fairfield, respectively, to Boston. The two places in question were situated on different branches of the same railroad. Mr. Commissioner Veazy said:

"A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed.

"The essential question here is one of relatively reasonable rates; not whether either rate is reasonable in itself. It is the effect of the carriers' action at one point upon the legitimate business prosperity of another point, which is the vital point in this controversy. If the present Fredericton rate does not actually result in profit, the carriers should not seek to control or stimulate traffic from that point by making the rate so low; and if they carry for unusually small compensation from that place they do so under the same injunction of the law that their action must not inflict undue prejudice or disadvantage upon other

communities or persons. When a carrier engages in transportation for which, by reason of competitive conditions or for purposes of its own, it receives less rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic."

Logan v. C. & N. W. R. R. Co., 2 Int. Com. Rep. 431. See also 2 I. C. C. Rep. 604-612.

Board of Trade of Lynchburg v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632, 646.

Lincoln Board of Trade v. Burlington & M. R. R. Co., 2 Int. Com. Rep. 95; 1 I. C. C. Rep. 147.

Geo. Tileston Mill Co. v. Northern Pac. R. Co., 8 I. C. C. Rep. 346-354.

(e) Eliminating incompetent testimony, the most satisfactory testimony in the cases before the court as to comparisons with other rates, is the tariff of appellant's own charges on other lines. This was considered by the Commission and state courts, and is one of the principal factors of the lower court's findings, that the existing rates are unreasonable.

Transcript of Record, Case 119, pp. 33 and 34.
Transcript of Record, Case 120, pp. 13 and 14.

In the cases at bar, it is impossible, from any testimony received, to determine the number of passengers, average length of haul, or any other factor necessary or competent to determine the reasonableness of any particular rate on any of the divisions involved in these suits, and the court will not permit itself to be misled by any incomplete statistics into making any unwarranted deduction.

"The question whether the rates are just and reasonable in themselves, is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service, and whether the instances thus employed are or are not such as by their relation to the case in hand, are subject to the operation of some other provision of the Commerce

Act, is immaterial. Besides, I think the question of the justness and reasonableness of rates, under the first section (Cf. Oregon Act, Laws 1907, Chapter 53, Section 12), is colored by other provisions of the law, and by the general policy of the whole enactment, which is to effect the equality of charges. And, at all events, it seems to me clear that the charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service or thing is sufficient to be reasonable."

> Interstate Commerce Commission v. East Tennessee, V. & G. Ry. Co. *et al.*, 85 Fed. 107, 114.

On appeal this court did not pass upon the reasonableness of the lower rate in itself, on the ground that the Commission had not done so.

> 181 U. S. 1.
> See also Int. Com. Comm. v. Southern Ry., 117 Fed. 741.

The value, if any, of evidence as to other rates introduced under a showing as to the conditions and circumstances of transportation, was entirely for the Commission.

> Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541.

III.

AS TO RULES APPLIED AND EVIDENCE CONSIDERED BY THE STATE COURT.

(a) Plaintiff in error avers that the Supreme Court in the cases at bar bases its decision on what might be called the "yard stick rule," and that its application to the cases at bar was unlawful.

While it must be considered that passenger fares may usually be made on a mileage basis (Savannah Bureau v. Charleston, etc., R. Co., 7 I. C. C. 601), in this case we submit that the Court considered all circumstances and found that plaintiff was simply discriminating unjustly between localities. It did apply the rule announced in Menacho v. Ward (C. C.) 27 Federal 529, quoting from page 532, after having first found that the services performed were of a like and contemporaneous nature. The word "like" is used in the statute and was so understood and used by the Court, as meaning "similar; resembling," and "contemporaneous," as meaning "at or about the same time." Then the Court in said case, 27th Fed. at page 532, says:

"The fact that the carrier charges some less than others for the same service, is merely evidence for the latter, tending to show that it charges them too much, but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services or property, is always sufficient against him to establish the real value, but it has augmented probative force and is almost conclusive against him when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public." The Court found in the cases at bar that for many years, plaintiff in error had been charging only a five cent fare from Lents to Portland, First and Alder streets, with transfer privileges to other lines controlled by it, the distance being 3.51 miles outside of the corporate limits, while it had been charging a ten cent fare from Milwaukie on a line it was operating almost parallel with the Lents line, without transfer privileges, Milwaukie being only 1.35 miles beyond the city limits, and the Court applied

the rule above announced, and in its decision, 56 Oregon, at page 483, in discussing the contention of plaintiff that the rate of transportation and the privileges prescribed in the order of the defendant and decree complained of, will not furnish a reasonable return on the capital invested, and that neither the defendant nor the Court can speculate as to the probable effect upon plaintiff's business, or upon the consequences, or any change in the population, or in the value of the property in the affected district, and that if any reduction is proper, an arbitrary diminution of five cents as to Milwaukie is unjust and unreasonable, said:

"We do not think it necessary to discuss either of these questions, for the plaintiff having agreed to accept a fare of five cents for carrying passengers between Portland and Lents, thereby asserted the value of the employment so rendered, by which measure it must be governed for similar service on the Oregon City division, an equal distance beyond the boundaries of the city of Portland."

And then cited the 27th Federal, and quoted therefrom the above rule.

The Court holds this to be unjust discrimination, and that the charging of the five cent fare from Lents and the ten cent fare from Milwaukie to the same point in Portland, giving a transfer with the lesser fare, denying it with the greater, cannot be justified on the ground of the Lents contract, the lower cost of constructing the line, density of traffic, nor difference in cost of construction; that in effect, neither one nor all combined are sufficient to justify the discrimination, and concluded that the service being alike and contemporaneous must be performed for an equal consideration, in effect holding that while a discrimination between localities might be justified by circumstances, no circumstances exist in the cases at bar to warrant the discrimination. Hence it is unlawful and it is within the power of the Railroad Commission to remedy. In discussing the requirement of

the Oregon Railroad Commission law in connection with Section 2 of the Interstate Commerce Law, the Court holds that the requirements to furnish a "like and contemporaneous service," as employed therein, is not limited to transportation over the same line, but extends to service on other lines operated by the same Railway Company, and particularly so when electric cars are used on urban, suburban or interurban railroads forming a general system, and on page 482 concludes the discussion with the following language:

"The cost of constructing and maintaining a portion of the railroad, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue on which dividends are declared, is not based upon ~~similar~~ divisions of the road, but on the entire system."

It will be remembered that all of these roads and divisions are owned and operated by the same company, accommodating different portions of what may be called the same community, to-wit: Portland and its suburbs, and no reason is shown why one suburb should be favored over another, nor why the mileage basis for percentage of travel, even if the Court had based its decision solely upon that rule, would not have been just and equitable. The difference in cost of construction is immaterial. The evidence fails to show that the company will not receive as great revenue under the rates prescribed by the orders attacked in these cases, as it did at the time the orders were made. It does show that the difference in density of traffic is mainly caused by the discrimination created by the plaintiff. The operation of the trains is part of the way over the same track. The divisions and roads all belong to the same system and no conditions whatever exist to justify any particular difference in rates. As far as the testimony throws any light upon the question,

under the rates prescribed, the company will receive ample revenue, including good dividends, upon its investment.

Under the circumstances of these cases, the fact that the plaintiff had established a five cent fare from Lents and maintained it so long that it claims an immense revenue by virtue thereof, we submit is competent evidence entitled to more than ordinary weight in determining the fact as to whether a five cent fare should not be granted on the Milwaukie line for the same distance, and no error was made in applying the rule announced in the Menacho Word case.

The State Courts properly held appellant's own rates were the most convincing kind of testimony. The Court rightly found (Transcript of Record, Case 119, page 37) that:

"The evidence does not show that, considered by themselves, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott divisions, the charges of the plaintiff for transportation of passengers between First and Alder streets and the town of Milwaukie, are unjust and unreasonable."

(b) **Traffic Will Not Bear Rates Condemned.**

The right of the carrier to fix rates which will yield a fair return on its investment is qualified by the rule that it cannot exact fares higher than the service is reasonably worth to the public requiring the service, or more than the traffic will bear.

> Cotting v. Kansas City Stock Yards, 183 U. S. 79.
> Puget Sound Elec. R. Co. v. Railroad Commission, 65 Wash. 75, 83-87.

(Citing and quoting numerous Federal, State, and Editorial authorities.)

The evidence was overwhelming to the effect that the traffic will not bear the ten and fifteen cent rates charged; that whereas, the topography and soil are extremely favorable for the development of the Milwaukie and Oak Grove districts, the effect of excessive rates to those points and lower car fares in all other directions, has been to stunt the growth of the sections involved herein and impoverish their citizens. Lents and Mt. Scott have grown enormously. St. Johns has made wonderful increase in population. This is due to the cheaper car fare elsewhere, and the high rate charged on the Milwaukie line, and to nothing else. The growth of the Lents district is directly due to the five cent fare. The Traffic Manager of the plaintiff in error, Mr. Mulchay, so testified.

(Transcript of Record, Case 119, p. 115.)

Q. "Isn't it a fact that the travel on the (Mt. Scott Division) line was built up on account of the fact you gave a five cent fare to Lents?"

A. "That is true."

The Commission and Circuit Court both made this same finding.

The Milwaukie and Oak Grove districts cannot compete with these other favored localities. A reasonable rate is one which would give them the advantage to which their geographical situation, topography and soil and civic improvements, would entitle them. Neither the carrier nor the State can disregard these matters in fixing a reasonable rate. These districts have not prospered, and cannot prosper under existing rates. They are entitled to have as reasonable rates as other districts, within sight, and having similar conditions, receive. The traffic will not bear existing rates.

However, we claim that the Court need not go into the question of fact except to determine whether there is testimony to support the findings and whether the Com-

mission has abused its discretion; whether it exercised a reasoning as distinguished from an arbitrary discretion. This Court is not determining whether this or that rate is reasonable, but only considers whether the order is lawful; not whether, if it were sitting as a Railroad Commission it would make the same order, but it is determining whether constitutional rights have been invaded and whether the Railroad Commission of Oregon and the State Courts have made such an arbitrary use of power as to be an abuse of discretion.

It is not necessary, in the cases at bar, to examine into this question, because the particular rates must be considered in connection with the whole schedule, and it is evident the reduction, if any, is but an insignificant part of the total revenues of the company and will not operate to confiscate the property of plaintiff in error. Nor need this question be examined into, because the rates have not been put into effect, a temporary restraining order having been issued in both these cases, and this Court will not interfere unless it is shown beyond any question that there will be a reduction so unreasonable that the property of plaintiff in error will necessarily be confiscated. Nor will it be examined into, because the reductions being all single rates, and the effect of the whole schedule not being attacked by the pleadings, it is no concern of the plaintiff in error, that the Legislature of Oregon, through its constitutional agency, fixes rates to one group of points, which the plaintiff thinks too low, or which may even in point of fact, as to that rate be non-compensatory.

However, we submit, that from a careful and impartial consideration of the evidence, this Court will reach the same conclusion as did the Commission and the State, Circuit and Supreme Courts—that the rates charged are unreasonable, and the rates ordered substituted therefor are in fact reasonable.

(c) **Old Rates Were Unjustly Discriminatory.**

Some discussion of the facts may be helpful before taking up further questions of law. Prior to 1901, the Lents district had a ten cent fare, with the necessity of a change in cars. By the consolidation of the lines, a through route was made, and the fare was reduced to five cents. The Milwaukie and Oak Grove fares were respectively ten and fifteen cents and have never been reduced, although the citizens had given at least eighty acres of land and cash subsidies on the strength of the assurance that they were to have low fares.

The Commission had before it, among others, the following witnesses, whose testimony may be taken as typical. This testimony, by stipulation, is before this Court. It bears as well on the question of the reasonableness of the rates charged.

TESTIMONY AS TO LENTS (MT. SCOTT LINE).

Testimony of Mrs. Eaton: Have resided at Lents for the past eight years and was secretary of the school district during 1901, 1905 and 1906. In 1901, we had two teachers, ninety scholars. In Districts 1 and 12 (three miles long and three miles wide) in 1906 we had eight teachers and a school census of 505 children; in 1907, eleven teachers and 633 children.

(Transcript of Record, Case 120, p. 77.)

Testimony of O. R. Additon: I am a real estate agent and have resided at Lents for the past six years. 1901 there were two stores at Lents. Now there are four drug stores, one hotel, fuel company, bakery, hardware store, meat market, two restaurants, one livery stable, two blacksmith shops, one harness shop, shoe shop, band, several lodges, a ten-room school, and two water works, all of which have been established since 1901. In selling real estate, I represent to the purchasers of lots (which

are more numerously sold than acreage) as an inducement for the purchase of the same, that we have a five cent fare.

(Transcript of Record, Case 120, p. 81.)

Testimony of George A. Brodie: Have lived in the Lents district eighteen years. Was an officer and stockholder of the Portland, Chicago and Mt. Scott Railway Co. (the company which was a party to the "Lents Central"). The traffic on this road before it was turned over to the appellant's predecessor was very light. We had a car every hour which sometimes carried two or three passengers and sometimes not that many until late in the afternoon. The cars were never over-crowded. Since that time the traffic has been increasing considerably all the time. Now we have a fifteen-minute service, 120 to 130 passengers to the car, and cars crowded all the time.

(Transcript of Record, Case 120, p. 87.)

Testimony of J. J. Johnson: I was born at Mt. Scott (Lents district) and have lived in that community all my life. On April 30, 1901, this road was there and passengers were transferred from the Portland, Chicago and Mt. Scott Railway Co.'s cars to the cars of appellant's predecessor at Mt. Tabor Junction. Very soon after the 1st of January, they shut down the Mt. Scott road and did not run until about July, 1901. I was over at the farm on the 1st of February. The territory had greatly dwindled. There was no growth at all.

The main thing held out in the sale of property was the five cent fare. It was advertised on account of the five cent fare. Real estate agents advertised it as being five cent fare and I think, even on some of their posters, the five cent fare was put on as an inducement to purchase cheap lots. Of course, prior to that time it was a district, you might say, of brush all the way from Lents Station clear to town excepting one or two points. It seemed it was cleared off and it surprised all of us. Houses

went up in every direction. There were some few houses between Portland and Lents Junction. Then they put up store after store all the way out that line. It looks almost like a city.

(Transcript of Record, Case 120, p. 93.)

Testimony of A. W. Miller: Have lived one-half mile this side of Lents since 1898. In 1898 there was perhaps from fifty to seventy-five families in and around Lents, within a radius of a quarter of a mile each way. I took the census of the Lents district and the Woodstock district, comprising an area of six miles square, and the total population of the two districts in 1900 was 905 souls. I cannot give the population of each district separately.

(Transcript of Record, Case 120, p. 95.)

TESTIMONY AS TO OREGON CITY LINE.

Testimony of B. Lee Paget: I have lived at Center over a year and am president of the Oak Grove Improvement Association. I rode from Oak Grove to St. Johns and the Union Depot at different times and before I got onto the kinks, which I learned by experience, but not from the conductors of the company, I paid twenty cents in riding those distances each time. I paid fifteen cents to First and Alder streets and no transfer was or is allowed on that fare and from there to St. Johns I paid five cents extra and in returning the same charges were demanded, collected and received by the company. I am a director of the Oak Grove school district; the present school census is 70 pupils. The school census of pupils in 1903 was 63; 1904, 65; 1905, 80; 1906, 93 and in 1907 there were 98. We never had more than two teachers. We have no electric lights or telephones. My friends claim that the reason why they do not visit me is that the railroad fares are too high and that they cannot afford to: for instance, if a family of four were to come out from the city to visit me and my family at Center, it would cost about $2.00 for

street car fare. Street car fare for my family to Portland and return costs me $20.00 per month.

We have two small stores in our district and a majority of the people work or have business in Portland. I know of several who left Oak Grove on account of the high fares and have heard of others. We have had no appreciable increase in population since I have lived there. The increase of population and houses in St. Johns has been so great as to be the talk of the city, county and state, almost. Nickum (on the Springwater division) is quite a distance outside of the city limits and the cars to reach there go through a deep and expensive cut. The fare from Portland to Center is unreasonable. If we got the five cent fare, Oak Grove, Courtney and Center would get to be larger than Lents.

(Transcript of Record, Case 120, p. 97.)

Testimony of R. W. Crane: I am a real estate agent and have lived at Courtney two and a half years and still reside there. I am not selling much real estate, but have considerable listed at and about Oak Grove, Center and Risley. I have made an effort to sell it but cannot do so readily. The greatest complaint was that the car fare was too high. They all like the location and soil, however.

(Transcript of Record, Case 120, p. 118.)

Testimony of John F. Risley: I have liver near Center for the past forty-five years. My station is Risley. I own land near Oak Grove and have endeavored to sell it, but have failed because the people all said that the street car fare was too high.

(Transcript of Record, Case 120, p. 119.)

Testimony of Judge M. G. Munly: I am interested with others in land near Milwaukie Heights, Center and Oak Grove. We gave subsidies to this Oregon City line, also land and rights-of-way, and so did the other people

living along the line. We gave them twenty acres of our best land, worth at the least $225.00 per acre. **The consideration for these subsidies and donations was that they would build the line and give us good service and cheap fares.** This was in 1893 or 1894.

(Transcript of Record, Case 120, p. 121.)

Testimony of W. G. Starkweather: I am a farmer and school director and engaged in the real estate business and live near Center. I have lived there for the past thirty-five years. I have endeavored to sell real estate near Oak Grove, Courtney and Center, but experienced great trouble for the reason that the fares were too high. The people gave subsidies, rights-of-way, and donated lands to the company. Mr. Risley donated about twenty acres and so did a Mr. Knapp.

(Transcript of Record, Case 120, p. 123.)

Testimony of Henry Heitkemper: I have lived at Oak Grove, near Courtney, for the past eleven years. The growth has been small during that time, about twenty houses and shacks in all have been built. Land sells very slowly around there. The reason is that they kick on the high fare. The first charge was twenty-five cents for a round trip ticket and then they raised it to fifteen cents straight. When I first went there, they charged eight cents to Oak Grove. Rights-of-way were given to the company and twenty acres of land was given by Breyman, Merritt and Hyler.

(Transcript of Record, Case 120, p. 126.)

Testimony of Thomas Howell: I have lived at Center Station in Oak Grove for the past five years. I own a small lot on Center avenue and run a merchandise store at Oak Grove. I was postmaster there. I counted up the population. I circulated a petition to be appointed postmaster and the government required me to make a close

estimate of the number of inhabitants within the delivery of the postoffice. The number was 300. There were two small stores in and about Courtney and Risley. There has been some sale of real property, but property has not been sold readily or easily. Some people have left on account of poor service and high fares. I have tried lately to sell real estate, but could not on account of the excessive fares. Good land is held at $500.00 an acre.

(Transcript of Record, Case 120, p. 127.)

The same character of testimony as above was given by a number of witnesses in regard to the growth of population, real estate values and the difficulty in selling lots around Milwaukie; also, testimony showing that the soil around Milwaukie and the Oak Grove district was very fertile and rich and would produce anything, while the soil around Lents and in the Lents district was gravelly and unproductive. That at the time the Lents contract was made land around Lents and in the Lents district was selling for about $100.00 an acre, while now it is selling at the rate of from $300.00 to $500.00 a lot, and the land around Milwaukie and in the Oak Grove district at the time of the execution of said contract was selling for about $500.00 an acre, and that now the values of real estate are about the same as then and the growth of Milwaukie and Oak Grove and the Oak Grove district has remained practically at a standstill, and that the reason of this is that the people who would naturally locate and purchase land and build homes on the Oregon City division were diverted therefrom on account of the five cent fare to the other branches of appellant's system, to-wit: Mt. Scott branch, Springwater branch and the St. Johns branch.

The evidence shows that these places and their real estate values are increased mainly by reason of the five cent fare; that any discrimination in fares in favor of one place against another builds up and increases the value of the property and the population in the favored places

and stagnates the growth of and value of the real estate of those places discriminated against; that there is a constant rivalry between the inhabitants of these places in building up their respective localities and towns, in increasing the value of their real estate, and in protecting the interests of the inhabitants thereof; that the population of Milwaukie and Oak Grove and the value of real estate in said places are about the same as they were seven years ago; that Lents, and the Lents district from the city limits to Lents, and the real estate thereabout, has increased in population and value to a wonderful extent.

That the street car business between Lents and Portland was built up from nothing to a paying basis on the five cent fare, and the same can be reasonably expected for those places on the Oregon City branch if the five cent fare is granted to them. If this five cent fare is granted to the people on the Oregon City branch, it will result through increased travel in a greater benefit to the company than did the five cent fare to Lents. That this unjust discrimination has had the effect of injuring Milwaukie and Oak Grove and the other places on this branch, both relative and actually, decreasing the value of the real estate in these places and retarding their growth.

Can this Court, from a consideration of the testimony, say that the Commission "abused its discretion," or that the order "shocks the conscience of the chancellor," or that the Commission has "not used an honest or reasonable discretion," or that it is not a subject as to which "reasonable men might differ" in the conclusions reached? Defendant in error is confident that if this Court feels it to be in its province to examine into this voluminous record—which we think is under the law unnecessary except to answer the questions propounded in this paragraph—it will reach the same conclusions as to the facts that were reached by the Commission and both the State Courts, with the witnesses before them, and

with a full personal knowledge of all the surrounding conditions, and after a more full argument than this Court can consistently take the time to listen to.

Passenger fares are legitimately classified according to the relation they bear to the development of traffic and tributary territory, and the ensuring of a constant income to the carrier. Suburban passenger traffic should be treated with especial liberality and accorded very low rates. Prosperous and populous suburbs contribute very profitably to the traffic of the carrier; suburban passengers are wholesale and permanent purchasers of transportation and are entitled to special consideration on that account. Not only the interests of the carrier, but sound public policy demands this. The healthy growth of the urban community demands a constant and healthy growth of the suburbs. More than this: public policy demands equal treatment of suburban districts. It is for the best interests of all, including the carrier, that the suburban growth should be symmetrical, normal and equal, in order that congestion may be avoided and development be made of all outlying land to the best advantage. No greater injustice can be perpetrated by a suburban carrier than to discriminate between its branch lines in such a manner as to build up one "like a city all the way along" and to prohibit the development of the other, through favoritism, for a pecuniary consideration, or even though the shortsightedness of its traffic managers or for real estate inflation.

(d) The Findings of the Commission—Defenses Urged.

The Oregon Commission found the existing rates were unjustly discriminatory (1) against the localities of Milwaukie and Oak Grove, and (2) against the individual inhabitants of those localities and persons using the company's line to those points.

The burden is on the company to show that the Commission's findings and order are unlawful; and appellant

may do this by showing the Commission made a **clear error of law** in applying the facts and reaching the conclusion that there is unjust discrimination, or that it abused its discretion in passing on the facts.

The company contended in the State Courts (1) that the Railroad Commission Act in no wise prohibits it from discriminating, justly or unjustly, between localities, and that at common law, it may discriminate unjustly between localities; (2) that the existence of the "Lents Contract" creates a dissimilar condition, so as to justify a discrimination, and (3) that the traffic is so much greater over the Mt. Scott (Lents) and Springwater divisions that it is not unjust to discriminate against the Milwaukie-Oak Grove line by charging materially higher fares for equal distances hauled. We will take up these defenses.

(e) Discrimination Between Localities.

Plaintiff in error contends the Oregon law in force when the orders of the Commission were confirmed did not authorize a regulation of fares in consequence of a discrimination against any locality, but only when a difference in charges was made to passengers for like and contemporaneous service; and the order of the Commission and decrees of the State Court affirming the same were therefore in excess of statutory authority and void.

It will be observed the question as to whether discrimination between localities is forbidden by the Oregon Railroad Commission Act, and its regulation entrusted to that tribunal, is entirely as to the construction of a State statute. No federal question is here presented.

After a painstaking examination of the statute and a cogent and unanswerable statement as to its reasons, the State Supreme Court held that "plenary power to correct discrimination as to localities was impliedly granted by the original (Railroad Commission) Act, and hence the orders undertaken to be set aside are not void for want of jurisdiction." (56 Or. 477.)

Right or wrong, this decision is binding upon this Court and will not be re-examined. Our contention renders analysis of the Act unnecessary in this respect, but if the Court deems it essential to go into this question, the essential portions of the Act are set out in the opinion, 56 Ore. 473, 477.

IV.

DISSIMILARITY IN CONDITIONS.

(a) Plaintiff in error relies upon the dissimilarity in traffic and population of the territory served to justify its discrimination against Milwaukie and Oak Grove and their inhabitants.

Under the Oregon Railroad Commission Act, as construed by the Supreme Court of that state, the dissimilarity in traffic and population of the territories served does not justify a discrimination against the localities involved in these proceedings. Argument to this effect by plaintiff in error, therefore, is beside the mark.

Section 48, of the Railroad Commission Act (Laws of 1907, Chap. 53) makes it an offense for the railroad to collect for carrying one person more than it demands from another "for a like and contemporaneous service." It will be noted that the unjust discrimination section of the Railroad Commission law of Oregon cited differs from Section 2 of the Federal Act to Regulate Commerce, in that the latter section contains the expression: "under substantially similar circumstances and conditions," which is omitted in the Oregon Act. In the case before the Supreme Court below, the plaintiff in error, there appellant, contended that such phrase, "under substantially similar circumstances and conditions" was reasonably implied in the Oregon enactment in construing what should be held to be unjust discrimination, and that there could be no "like service" unless it was for carriage over

the same line, and hence the difference in charges for transporting persons over another branch of the plaintiff's railroad was not prohibited nor unjustly discriminatory. Answering this contention the Supreme Court of Oregon (56 Oregon 481) said:

"The Legislative Assembly of this State, in framing section 48 of the Railroad Commission Law, patterned it somewhat after section 2 of the Interstate Commerce Law and it would seem that the phrase 'under substantially similar circumstances and conditions' has been purposely omitted from our enactment. This act of Congress was designed to correct unjust discriminations in charges for the transportation of passengers and freight from one state or territory to another, while our law is applicable only within the state of Oregon. * * * These facts were undoubtedly considered in framing section 2 of the Interstate Commerce Law, and induced the insertions therein of the phrases 'a like and contemporaneous service' and 'under substantially similar circumstances and conditions,' the latter of which seems purposely to have been omitted from our law under subject. The absence of such clause from our statute leads to the conclusion that the phrase, 'a like and contemporaneous service,' as employed therein, is not limited to transportation over the same line, but extends to service rendered on other lines operated by the same railway company, and particularly so when electric cars are used on urban, suburban, or interurban railroads. The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of a line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based upon particular divisions of the road, but upon the entire system." (56 Oregon 481-482.)

Plaintiff in error also insisted in the Supreme Court below that the cost of constructing the Mount Scott Division (the favored line) was 50 per cent less than the Oregon City Division (upon which the points Milwaukie and Oak Grove are situated), and that the number of passengers on the Oregon City Division, north of Milwau-

kie was less than one-twentieth of those on the Mount Scott Division, and that the service performed was so dissimilar, and rendered under such diverse circumstances and conditions, as to make the difference in fares between Lents and Portland and between Portland and Milwaukie, and also between Portland and Oak Grove, not unjustly discriminatory against the latter towns.

The Supreme Court of Oregon pointed out that the five cent rate of transportation for a continuous trip in one direction between any two points within the city of Portland extended by compulsion to the boundary of that city (Section 2096 B. & C. Comp.), where the second district of rates begins unless the first is voluntarily continued beyond that section. Applying the construction found by the Supreme Court of Oregon to be given to Section 48 of the Railroad Commission Law, that Court further held that the zones of fares should be computed along the lines running outward from the city boundary (56 Oregon 480). The lower court held that inasmuch as the plaintiff in error had agreed to accept the fare of five cents for carrying passengers between Portland and Lents, the latter point being a considerable distance outside the boundary of the city of Portland, it had thereby asserted the value of the employment so rendered, and by that measure the Railroad Commission law required it to be governed for similar service on the Oregon City Division for an equal distance beyond the boundaries of the city of Portland. (56 Oregon 483.) Not only had the plaintiff in error voluntarily extended its five cent zone a distance of 3.51 miles beyond the city limits to Lents on its Mount Scott Division, but it had also carried the five cent rate a distance of .56 mile outside the city limits from Portland to Nickum.

We submit that under the construction of Section 48 of the Commission Act as given us by the highest court of the State of Oregon, it is not incumbent upon this Court to enter upon an examination of the question as to whether the traffic and population of the territories served

on the respective lines of the plaintiff in error involved herein justify the discrimination which has been practiced against Milwaukie and Oak Grove and their inhabitants. The construction of the Railroad Commission Act by the highest court of the state which enacted it, is of course binding upon this court, and when the law is so settled, then the question as to whether the facts in the particular case constitute a discrimination which the law forbids is a question of fact which it is not incumbent upon this Court to re-examine.

(b) In considering whether the discrimination is justified, we observe that plaintiff in error may not avail itself of conditions which are the result of the discrimination complained of. When the discriminatory rates were given Lents, the conditions now existing were reversed, and the discrimination was given in spite of the reasons now advanced to justify it. Further, the difference in traffic and population relied upon will be elminated by an enforcement of the Commission's order.

The reasonableness of the rates has nothing to do with the question as to whether they are discriminatory; the Oregon legislature has forbidden rates which are unjustly discriminatory, as well as rates which are unreasonable. Reasonable charges may constitute an unjust discrimination or create an unlawful preference. It is enough to show that the company carried at a lower rate for the same or a similar service.

Scofield v. Railway Co., 43 Ohio St., 571-615.

Interstate Commerce Commission v. East Tenn. Ry. Co., 85 Fed., 107-114-115.

State v. Minneapolis Ry. Co., 80 Minn. 191.

Cordele Machine Shops v. L. Ry. Co., 6 I. C. C. Rep. 361.

Great Western Ry. Co. v. Sutton, 4 Eng. & Ir. App. 226.

Kinnavey v. T. Ry. Assn., 81 Fed. 802-804 (bottom).

Interstate Commerce Comm. v. Cinn., etc., Ry. Co., 167 U. S. 479, 511.
Board of Trade v. Ry. Co., 6 I. C. C. Rep. 632, 645.
Beale v. Wyman, R. R. Rate Reg., Sec. 839.

The State Supreme Court has given the Act of the Legislature of the State this interpretation (56 Ore. 487), and here again the decision of the State Court is controlling. It is, therefore, to be taken as settled that the law of that state forbids charges which are "in any respect unreasonable **or** unjustly discriminatory." (Id.)

(c) Preference of one locality over another without a lawful excuse is in and of itself an undue and unreasonable discrimination.

N. Y. P. Ex. v. Baltimore & O. Ry. Co., 7 I. C. C. Rep. 613, Syll. 2, 659.

First: Differences in circumstances and conditions of transportation that are of the carrier's own creation or connivance or that by a reasonable effort on his part might have been avoided, cannot justify a discrimination in rates.

East Tennessee & G. R. Co. v. Interstate Com. Comm., 181 U. S. 18, 20.
Business Men's Assn. v. Chicago, etc., R. Co., 2 Interst. Com. Rep. (double column ed.) 41, 46; 2 I. C. C. Rep. (single column ed.) 52.
Rice v. Western N. Y. Ry. Co., 3 Int. Com. Rep. (double col.) 162; 3 I. C. C. Rep. 87 (single column ed.).

Says Mr. Justice White, in East Tennessee & G. R. Co. v. Interstate Com. Comm., **supra** (pp. 18, 20 of opinion):

"The prohibition of the third section, when that section is considered in its proper relation, is directed against

unjust discrimination or undue preference arising from voluntary and wrongful acts of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions **wholly** beyond the control of such carriers. * * * There may be cases where the carrier cannot be allowed to avail of the competitive condition, because of the public interests and the other provisions of this statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than cost of transportation to particular places."

This is just what the street car company did. When the discrimination was commenced, and for some considerable time afterwards, plaintiff in error claims it carried people to Lents at a loss, and if so the loss had to be made up out of the other lines, including the Oregon City division. So with the Springwater division. The Lents line, they now say, is a paying line. That fact, having its origin, as it did, cannot be availed of as a dissimilarity in circumstances to justify this discrimination.

Second. At the time the contract was made and the railroad company began to discriminate the volume of business was in favor of Milwaukie and Oak Grove and their respective districts, hence the discrimination was not then justifiable under the theory now advanced by plaintiff in error.

Mr. Miller, inspector on the lines of plaintiff in error and formerly conductor on the Mt. Scott line, a witness for the plaintiff, testified and said as to traffic on the Mt.

Scott line: **"I know five years ago we handled it with two cars."** (Miller's testimony, Case 119, record, p. 122.)

At that time, Milwaukie had a population of about five hundred and Lents a population of about fifty. Milwaukie and Oak Grove district had a population of about two thousand and Lents district of about fifty to seventy-five families within a radius of one-half mile on each side. Now, the population of Milwaukie is about seven hundred and Lents proper about five hundred; Milwaukie and Oak Grove districts have a population of about two thousand and Lents district a population of about ten thousand.

The evidence shows that the natural advantages of soil and location now are and were prior to the Lents contract in favor of Milwaukie and Oak Grove and the places on the Oregon City branch; that the population and the price of real estate were in favor of said places prior to the five cent fare to Lents. Notwithstanding this, Lents and its district has outstripped Milwaukie and Oak Grove and their districts, as aforesaid, and the value of real estate at Lents and in the Lents district has increased from $100.00 per acre to $2,500 per acre and over. While thousands have settled along the Mt. Scott line, families have found the fare to Oak Grove too high and have had to move where there was cheaper fare.

What caused this great increase in population and real estate values in Lents? Numerous witnesses, and even Mr. Mulchay, traffic manager for the plaintiff in error, tell us that it was the effect of the five cent fare. (Mulchay's testimony, p. 148.)

This was the result of the very act of plaintiff in error complained of, which it has no right to take advantage of as a defense. (Authorities cited.)

The fact that the five cent fare was granted at a time when the volume of business at Milwaukie and its district exceeded the volume of business at Lents and its district and the places on the Springwater division, proves the volume of business had nothing to do with the inception of the five cent fare.

Third. But, is the volume of business from Lents station, and from Gates and Jenne greater than the volume of business from Milwaukie and Oak Grove?

The great volume of business on the Mt. Scott line is from Hazelwild to the city boundary. (Miller's testimony, Record Case 119, p. 119.) Between Lents and Hazelwild, a distance of 1.65 miles, the volume of business is no greater than the volume of business between the city limits and Milwaukie. (See the testimony of Miller, pp. 119, 120, Case 119.)

As to the volume of business between Gates and Jenne as compared with the volume of business between Oak Grove and Center it is conceded by plaintiff in error that there was no substantial difference.

Therefore, the volume of business has nothing to do with the **maintenance** of the five cent fare, any more than it had with the inception of the rate.

Counsel claims that the five cent fare to Nickum is not discriminatory because appellant cannot establish a **depot** at the city boundary on account of the track being on a fill. If the law makes the city boundary the basis of the five cent fare, why change it and make Nickum, three-fourths of a mile beyond, the basis? The company can charge the people at Nickum five cents for riding from the city boundary to Nickum just the same as the people of Milwaukie five cents from the city boundary to Milwaukie or vice versa. Why should the establishment or non-establishment of a depot building at the city limits prevent the plaintiff from charging a fare of ten cents from First and Alder streets to Nickum? The cost of the road from the city boundary to Nickum is five times the cost of the road from the city boundary to Milwaukie. (Fuller's testimony, Record Case 119, pp. 154, 157.) If, based upon the cost of the road, the fare to Nickum would be greater than to Milwaukie.

Lents, Jenne, Gates, Nickum, St. Johns, Milwaukie and Oak Grove are suburbs of the City of Portland. The bulk of the population of these places works in the City of

Portland, sends its children to the schools of the city, and travels on the lines of the plaintiff's road.

The making of Lents and Nickum the basis of the five cents fare instead of the city limits is unlawful and wrong and the appellant, according to its own showing in transporting passengers from the city limits to Lents, a distance of 3.51 miles, for nothing, and from the city limits to Nickum, a distance of over one-half mile, for nothing, and from the city limits to Jenne, 8½ miles, for ten cents, is guilty of a gross, unjust and unreasonable discrimination against Milwaukie and Oak Grove, on the Oregon City line, whose residents the appellant charges for the same service five cents and ten cents, for transportation from the city boundary—1.35 miles and 3.12 miles, respectively.

Mr. Mulchay testified (Case 119 p. 114 ~~Transcript, pp. 147 and 148~~):

We use the city limits as a base for grouping suburban rates beyond; are compelled to accept only five cents within the city limits, therefore base the groups outside the city limits as from the city limits.

Q. Will you please tell the court why it is you do not charge anything from the city limits to Lents other than a five-cent charge from Portland to Lents? Just explain then how you harmonize with the city limits as a basis.

A. In the case of Lents it is not harmonious. Therefore, the company is carrying people according to that from the city limits to Lents for nothing, a distance of 3.72 miles, and is charging the people who travel from Golf Links (city limits) to Milwaukie five cents, a distance of less than 1½ miles, and people to Oak Grove and Risley, about three miles, ten cents.

We contend that the service, transportation of passengers, is the same. The Commission has found that the volume of business and the difference in the cost of these branches are not controlling factors which would warrant any such discrimination; and it being a question of fact

and free from fraud and error of law, the order should stand and not be disturbed. Appellant has no vested right to discriminate; rights obtained and contracts made which violate public policy and the police power of the State are not such rights and contracts as are contemplated by the constitution.

The consideration for the Lents contract was no greater than the subsidies paid on the Oregon City line, and regardless of this, the difference in fares has far more than compensated the company. If it could be shown you would find that the excess fares charged the people of Milwaukie and those living on the line in the Oak Grove district, from the date of the Lents contract would pay for the building of four roads like the one turned over to appellant by the Portland, Chicago & Mt. Scott Ry. Co. in consideration of the five-cent fare.

The Milwaukie-Oak Grove line was cheaper to build, is more level, has fewer curves, requires fewer cars to operate, and is a much less expensive line to maintain than the Mt. Scott or Springwater line. (See testimony of Streib, p. 229, Case 119.)

One of the most astonishing propositions advanced by counsel for appellant is that appellant has the right to make a contract with the Portland, Chicago & Mt. Scott Railway Co. for a reduced rate—5c (which creates an unreasonable and unjust discrimination against the people and places on the Oregon City branch) and that appellant may then build the Springwater branch between the two other branches and may cause the Mt. Scott and the Springwater branches to compete with each other, in consequence of which the fare on the Springwater branch is reduced to meet the fare on the Mt. Scott branch. Appellant creates an unjust and unreasonable discrimination against the people and places on the Oregon City branch, and then undertakes to justify this discrimination on account of this same competition. This is clearly an act of their own creation and a violation of the act of 1907.

The whole "house that Jack built," (Complaint, Par. XIV-XVI), is based upon this contention and hypothesis. Equally astounding, from a traffic standpoint, that because the fare from Lents Junction to First and Alder streets over the Mt. Scott line is ten cents, that has to be the basis for all intermediate points between Lents Junction and First and Alder streets on the Springwater line. Fares to local points are not, in practice, or necessarily, made by using a short distance through line rate as a basis. The company may well say, "If you use the short line, the hypothenuse of the triangle, we will carry you for ten cents; if you want to go over the other line, around two sides of the triangle, you'll have to pay the ordinary fare on that line, and we decline to let the short line disarrange our local fares on the long line." Certainly if it voluntarily makes such an arrangement it ought not to complain if the State requires it to afford other localities and passengers on other lines the same rates. The Hill lines have a short line from Portland to Spokane (via North Bank) which corresponds to the Mt. Scott division; also a longer line from Portland to Spokane via Puget Sound, which corresponds to the Springwater division. The fare between Portland and Spokane is the same either route, but not a single **local** rate in or out of Spokane or Portland is affected a penny, and the company insists on restrictions which prevent the use of the through rate for local purposes. Similarly the Harriman lines at times make the same rate from the Missouri River to Willamette Valley points via either the O. R. & N. or Shasta Route; and the Southern Pacific makes the same rates to Portland from McMinnville via the west side or Yamhill divisions—yet not a single local passenger fare is disarranged. The inability of appellant's passenger traffic department to meet a very simple and common situation like this is not, as a matter of law, a justification of this unjust discrimination. So with the giving of transfers. Two passengers board the car going into Portland, from Oak Grove; one pays fifteen cents fare,

asks for a transfer, and is refused. He has to pay five cents more for his ride to the place where he works, or goes to school. Total, twenty cents. The other pays ten cents fare to the city limits and then pays five cents from the city limits in, asks for a transfer, and gets it, good to any point in Portland. Total, fifteen cents. The consequence is that a man who is "initiated," as Mr. Paget testified, pays his fare in two installments and gets his transfer, while the man who is not initiated pays five cents more for his want of knowledge. Appellant has an idea that by an interurban passenger paying his fare to the city limits and then from the city limits in, he becomes a "city passenger," whatever that may be. But such action can no more change the status of a passenger, as an interurban passenger, than paying a fare to the State boundary and then on makes a man a state as distinguished from an interstate passenger. It is really a useless, meaningless, unreasonable piece of red tape, and ought to have been cut out by the company without bothering the Commission or courts. This is one of the "devices" forbidden by our act.

We desire to call the Court's attention to the fact that in all the cases cited by appellant in the State Court, with the exception of one, the dissimilar circumstances and conditions were the result of competition, and doubtless the same cases will be cited in this Court.

In the cases before us the element of competition, the most powerful factor in rate-making, is absent.

The Supreme Court, in the case of I. C. C. v. Alabama Midland Ry. Co., 168 U. S. 144, held: "That any competition which is controlling on rates and traffic produces in and of itself a dissimilarity of circumstances and conditions."

In conclusion on this point, we desire to say, that the respondents do not want one atom of property belonging to the appellant or any railroad. A contract between the State and a railroad company, if not contrary to public policy and the laws of the State, should be inviolate. It

ought not to be touched by hostile hands. On the other hand, the people have rights as well as the railroad companies, and the rights of the people are or ought to be as sacred as theirs.

In these cases the rights of the people have been grossly violated and they are undertaking to compel the railroad company to right the unjust impositions placed upon them.

V.

FINDINGS OF FACT BY COMMISSIONERS NOT SET ASIDE BECAUSE COURTS MIGHT DIFFER.

The courts do not set aside the action of the Commissioners because they do not agree with the latter on the question of fact decided. They only set aside orders when the Commission has exceeded its jurisdiction by acting where the statute has not given it the power to act, or where it has not acquired jurisdiction over the railroad, or has made its findings without any support in the evidence or laws, or has abused its discretion so its orders "shock the conscience of the chancellor," or where the legislative act resulting from the joint action of the legislature and Commission violates a constitutional guaranty. No cases are found where the courts have set aside a particular rate fixed by a Commission because in fact unreasonable, when based on substantial, although conflicting testimony.

Illinois Central R. Co. v. Interstate Com. Comm., 206 U. S. 441, 459, and cases cited.

Cincinnati, H. & D. R. Co. v. Interstate Com. Comm., 206 U. S. 142, 154.

Spring Valley Water Works Co. v. San Francisco, 82 Cal. 286, 306; followed in San Diego L. & T. Co. v. National City, 174 U. S. 739; same v. Jasper, 189 U. S. 439, 441.

Steenerson v. Great Northern R. Co., 69 Minn. 353, 376, 410.

Jacobson v. Wisconsin M. & P. Ry. Co., 71 Minn. 519, 529; affirmed in 179 U. S. 287, 301.

International, etc., Co. v. R. R. Commission, 86 S. W. (Tex. Ct. App.) 16, 17; affirmed 89 S. W. (Tex. Sup. St.) 961.

Morgan's, etc., R. Co. v. R. R. Commission, 109 La. 247, 265.

In re Auburn & W. Ry. Co., 55 N. Y. Supp. 895.

People v. Board of R. R. Commrs., 65 N. Y. Sup. 597, 599.

In re Amsterdam, 33 N. Y. Supp. 1009, 1010.

Storrs v. Pensacola R. Co., 29 Fla., 617, 11 So. 226, 230.

State ex rel. v. Seaboard Air Line R. Co., 37 So. (Fla.) 314, 319.

Minneapolis St. P. & S. Ste. M. R. Co. v. R. R. Commission, 116 N. W. (Wis.) 905, 913.

Railroad Commission v. American Tel. & Telg. Co., 212 U. S. 414, 420-421.

Any other conclusion would overwhelm the courts with appeals from such administrative tribunals, and cast upon the judiciary a burden which it is not permitted, constitutionally, to perform. Something may be entrusted to other branches of the government than the judiciary.

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598.

Further, the rule is well established by this Court that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this Court is concluded by such finding.

In Vol. 1 Encyclopedia of the U. S. Supreme Court Reports, page 781, after discussing the rule in actions at law and in chancery, the rule is laid down as follows:

"Not only the very nature of a writ of error, but also the rulings of this court from the beginning make it clear that on an error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this court is concluded by such finding."

And many decisions of this Court are cited in support of the proposition. We revert to and take excerpts from only a few:

"No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below and as they are exhibited by the record."

United v. King, 7 How. (U. S.) 832, 865, approved.
Dower v. Richards, 151 U. S. 658, 666.

"The findings of fact by the trial court and by the Supreme Court of the State are, in this writ of error, conclusive upon us."

Hedrick v. Atchison, Topeka & Santa Fe Ry. Co., 167 U. S. 673, 677.

"In this court we are concluded by the findings of fact made in a State Court in a suit in equity as well as in an action at law."

Bement v. National Harrow Co., 186 U. S. 70, 83.

"It has often been held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest courts of the State upon a pure question of fact, although a federal question might arise if the question of fact were decided in a particular way."

Israel v. Arthur, 152 U. S. 355, 362.

"True it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Ry., 92 U. S. 315, 317) treated as open for further consideration the question whether in chancery cases the power existed in this court to review the de-

cision of State Courts upon both the law and fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below this court is concluded by such findings."

Egan v. Hart, 165 U. S. 188, 189.

These cases, and the cases cited, are sufficient, we think, to establish the proposition that this Court will not review the findings of fact as made by the State Courts, and hence will attempt no further discussion thereof.

VI.

THE LENTS CONTRACT IS NO DEFENSE TO UNJUST DISCRIMINATION.

While we are not sure that the plaintiff in error will rely upon the arrangement made between the Portland, Chicago & Mt. Scott Railway Company and plaintiff's predecessor whereby the people of the Lents district obtained a five-cent fare, we will briefly discuss the propositions relative thereto.

Whenever a contract is made an instrument for creating and perpetuating a discrimination as unjust as that involved in the cases at bar, we submit that such contracts cannot be used as a shield to protect the company in such discriminations, for the following reasons: (a) The very action of the Commission now being reviewed was in contemplation of law a part of that contract; and, (b) If construed otherwise, the contract is now void as against the police power of the state.

(a) When said contract was executed both parties had voluntarily become common carriers and had assumed the duties which the law imposes upon a business clothed with a public interest. In the absence of a contractual waiver of the right to regulate, the state reserves as a

continuing right the regulation of the business of a common carrier to prevent extortion and to secure to its citizens the fullest justice and equity both of charges and services. Whenever a carrier does a business which the State might properly do itself; it is a governmental agency for public purposes, although owned individually.

Talcot v. Pine Grove Tp., Fed. Cas. No. 13,735, Vol. 23, (affirmed 19 Wall. 666) pp. 660-1-2-3.

"Such corporations are incorporated not for mere private ends, but in view of the public good they subserve. * * * In all these enterprises there is a mingling of both public and private benefit and the interests of the public are not to be sacrificed to mere private gain."

Holloday v. Patterson, 5 Ore. 177.
Ford v. Oregon Electric Co., 60 Ore. 278, 286.

Contracts such as the "Lents contract" involved in these cases are subject to the subsequent exercise of the police power.

Fitzgerald v. Grand Trunk Ry., 13 L. R. A. 70.

When a railroad contracts with the public concerning a matter which affects the public health, safety and welfare it does so subject to the subsequent exercise of the police power, which does not thereby impair the obligation of the contract.

C. B. & Q. Ry. Co. v. Nebraska, Ex Rel Omaha, 170 U. S. 57-72.

One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract concerning them, and the contract carries the infirmity of the subject.

Hudson Water Co. v. McCarter, 209 U. S. 349; 28 Supreme Court Reporter, 529.

The regulation of the business of a carrier which may be necessary today may not have been necessary yesterday, and may be either inadequate or unnecessary tomorrow. But the forbearance of the legislature to regulate yesterday confers upon the carrier which is occupying a sort of public office, an arm of the government itself, no right to contract so as to bind the State that today or tomorrow the legislature will not interfere and exercise its right to regulate intrastate commerce. In order to claim a contractual waiver, plaintiff in error must point to some statute of the State expressly, or by necessary implication, making the waiver, and none exists, or did exist, in this State when this contract was made. The law of this State was that the business in which these carriers engaged was clothed with a public interest. They were also occupants of the public highway of the State, charging tolls for its use. These companies exercising attributes of sovereignty in the conduct of their business, the State, for the good of all concerned, at all times reserved to itself the full power of regulation, to prevent extortion and unjust treatment and to secure the most beneficial use of its public highways. The right of the State to regulate is a continuing right. These principles were the law when the "Lents Contract" was executed, and are now the law.

It is, we submit, a familiar principle that the whole **corpus** of the existing law must be read into every contract. The parties to said contract must be held to have had in mind the fact that the legislature might at some time during the life of the contract exercise its theretofore unused rights to prevent discriminations between localities and individuals; and when the legislature uses such right, it does not thereby impair the obligation of a contract, because the very regulative act of the legislature was a tacit part of the contract itself.

C. B. & Q. Ry. Co. v. Nebraska, Ex Rel Omaha, 170 U. S. 57-72.

Fitzgerald v. Grand Trunk Ry. Co., 13 L. R. A. 70, and 209 U. S. 349; all before cited.

Both the Mt. Scott company and plaintiff's predecessor, and plaintiff itself, were formed under the general laws of Oregon, and hence their corporate rights and powers "may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." (Article XI, Section 2, Oregon Constitution before amendment.) This reservation on the part of the State must necessarily be considered as written into the charter of each of said companies and into every contract made by them.

Therefore, when by general law the State forbids discrimination which may have been lawful theretofore, it is merely exercising a power which it reserved to itself in creating the corporations. The right to discriminate is not a "vested corporate right," because the manner in which the carrier shall conduct its business with the public is essentially a public matter and the corporation is to that extent a mere agency of the State.

McCandless v. Richmond & Danville R. Co., 38 S. C., 103.

Southern Wire Co. v. St. Louis, etc., R. Co., 38 Mo. App. 191.

(b) Such a contract cannot hamper the police power of the State.

N. Y., N. H. & H. Ry. Co. v. Interst. Com. Comm., 200 U. S. 361-395.

People v. Hawley, 3 Mich. 330, 342.

Bridge Co. v. Bunnel, 4 Conn. 54.

In re O'Neil, 41 Wash. 174.

Regulation of railroads is part of the police power of the State.

State v. Mo. Pac. Ry. Co., 92 Pac. (Kan.) 606-611.

In Atchison v. Ritchie, 10 East. 530, Lord Ellenborough said in the opinion, page 534:

"That no contract can properly be carried into effect which was originally made contrary to the provisions of law or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt."

That a contract valid at the outset may become void whenever in the process of time, owing to changed conditions, its execution results in the violation of an act to regulate commerce.

N. Y., N. H. & H. Ry. Co. v. Interst. Com. Comm., 200 U. S. 361.

Armour Packing Co. v. U. S., 153 Fed. 1-18; affirmed 28 Supreme Court Reporter 428, 435.

Bullard v. Northern Pacific R. Co., 10 Mont. 168-185.

Church v. Minn. St. L. Ry. Co., 14 S. D. 443.

These discriminations in favor of the Mt. Scott and Springwater divisions against the other lines grow out of the Lents Contract, the consideration for which was the furnishing of a facility now used by appellant in transporting passengers to Lents. This is prohibited by the latter paragraph of Section 48 of the Oregon Act.

The Oregon Act, as has been shown, is broader than Section 3 of the Interstate Commerce Act. The provision just quoted was not found in the Interstate Commerce Act. It is intended to cover just such cases as the Lents Contract and the contract in the case of Root v. L. I. R. Co., 4 L. R. A. 331. Subterfuges of this kind—"devices," they are called in the act—used by railroads to defeat the beneficent intent of the statutes led to the enactment of the Elkins law, passed on in the Armour case, **supra**, and to the provision in Section 49, quoted above. The trackage furnished by the Lents people is a facility, just the

same as the warehouses in the Root case, where a side or additional track connected two railroads.

The Bullard case and the Armour case are practically the same as the Lents case. In these two cases the contracts entered into by Bullard and Armour with the railroad companies created dissimilar circumstances. This is the same as the Lents contract does, as claimed by plaintiff, and yet the court in both instances held that these contracts violated the act and were unlawful and void. The Circuit Court, speaking in the Armour case (153 Fed. 1, 18) said: "It is true in the cases last cited that the contracts were made after the higher rates had been filed and published, but the Elkins act declares the **receipt** of the concession from the rate filed and published after the execution of such contract to be illegal in the same terms as it does that from a rate filed and published before the contract is made, since it declares the receipt of every concession from the filed and published rate illegal." And because the collection and receipt creates the unjust discrimination and undue prejudice against the people and the localities on the Oregon City branch, it violates Sections 48, 49 and 55 of the Oregon Act.

At the time the Lents Contract and the contract in the Root case were executed, Section 48 of the Oregon Act, as above quoted, and the Elkins Act were not in force. The Elkins Act was not considered in the Root case and had it been in force the court could not have held other than was held in the Armour case and the Bullard case. The court, speaking in the Bullard case, said (10 Mont. 185):

"If the contract mentioned in the complaint has been fulfilled, it is plain that after the act of Congress became effective and during the period specified in the pleadings there would have been a discrimination in favor of the respondent by the appellant in the sum of $595.95 on account of the transportation of his goods. In other words, the patrons of the N. P. R. Co. who had no special agreement would pay this same amount for the same services in

excess of what would have been demanded of the respondent. It has been adjudged in many cases that when these circumstances arise the contract which was entered into by the parties to this covenant was contrary to public policy and cannot be enforced."

In the Bullard case (10 Mont. 168) the contract is set forth **verbatim** and the clause containing the additional consideration for the contract, besides the freight charges, is as follows:

"And said parties of the second part, Bullard and Irvine, further covenant and agree **that they will not brew or manufacture any beer or other malt liquors at or within the corporate limits of Miles City, Montana Territory, between the date hereof and the 1st day of November, A. D. 1887.**"

In the Bullard case, there was an addtiional consideration given just the same as in the Root contract and in the Lents contract. The contract was for a certain period which had not expired, the same as the Lents, Root and Armour contracts, and yet the court found that these contracts were unlawful.

In Brundred v. Rice, 49 Ohio St. 640, 32 N. R. Rep., page 169, 34 Am. St. Rep. 589, Brundred agreed to and did build pipe lines from the oil fields to the railroad company, under an agreement in substance as follows: Said Brundred et al. agreed to build and construct a system of pipe line, pump, pumping stations, storage and receiving tanks, loading racks and telephone lines, etc., for the collection of the oil production of the oil fields of Ohio, and deliver the oil free of charge onto the cars on the line, exclusively on said railroad.

In consideration of the aforesaid, the said railroad agreed to divide with the said Brundred et al. the open rail rate of 30c per barrel on all oil collected from all shippers of oil over said road.

The court, in commenting on this contract, said: **"That the contract between Brundred and his associates was against public policy and void, will hardly admit of question."**

As said by Baxter, Justice, in Handy v. Railroad Co., 31 Fed. 689, **"Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation or individuals owning them and to that extent private property, they are by the law and consent of the owners dedicated to the public use."** Except in the mode of using them, every person has the same right to demand the same services of the railroads on equal terms that they have to the use of the public highway or the government mails.

The cases at bar are the same as the Bullard, Armour cases. The Lents contract is the same as the contracts in these cases. Yet the Armour and Bullard contracts were held to violate the Interstate Commerce Act, and therefore to be void.

VI.

DUE PROCESS AND EQUAL PROTECTION OF LAW.

We claim that nothing in the record tends to show that the plaintiff in error has been deprived of property without due process of law or in any way denied equal protection of the laws within the meaning of the first section of the Fourteenth Amendment of the Federal Constitution.

(a) Due process of law has been frequently defined by this Court, and we believe a few excerpts from some of these decisions will present our view better than we are otherwise able to do it.

In Davidson v. New Orleans, 96 U. S. 97, at pages 104 and 105, the Court, in discussing this question, says:

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan v. Anderson* (95 Id. 37)."

Also, in the case of Public Clearing House v. Coyne, 194 U. S. 497, at pages 508 and 509, we find the following:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of

constitutional limitations; *Murray's Lessee v. Hoboken Co.*, 18 How. 272, 280; *Bushnell v. Leland*, 164 U. S. 684. As was said by Judge Cooley, in *Weimer v. Bunbury*, 30 Michigan, 201: 'There is nothing in these words, ("due process of law") however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress.' If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

Also, it is held in Reetz v. Michigan, 188 U. S. 505, at page 508, that the right of appeal is not an essential element of due process of law. This case cites the case of *Pittsburgs, etc., Railway Company v. Backus*, 154 U. S. 421 (p. 427) quoting therefrom with approval.

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so."

From the foregoing, and many other decisions of this Court which we deem it unnecessary to cite, we submit that the essentials of due process of law are reasonable notice and a fair opportunity to be heard before some tribunal competent and proper to the subject to be considered and in a mode constituted to the nature of the cause, and not merely arbitrary and capricious. Under the Oregon act now being considered in the cases at bar

every possible opportunity has been given and been taken advantage of by the plaintiff in error for a full hearing with counsel and witnesses. Complaint was filed before the Railroad Commission; due notice given; a full hearing had; decision and order rendered by the Commission; complaint was filed by plaintiff in error in the Circuit Court for Marion County to set aside the orders; issues joined, and full hearing before the Circuit Court, additional testimony taken, the case sent back to the Commission for further consideration and reargument before the Commission, modification of the findings by the Commission, the controversy recertified to the Circuit Court and the orders there affirmed; appealed to the Supreme Court of the State, and, after decision adverse to plaintiff in error, then these writs. The fullest opportunity was given at every stage of the proceedings for all parties to be heard, with their witnesses, and to present their contentions, both by oral and written arguments, and this procedure is provided in the Oregon act. Therefore plaintiff in error cannot, with any grace, urge it has been deprived of property without due process of law, and especially when there is no evidence, as in the cases at bar, to show, or from which it can be reasonably inferred, that plaintiff has been deprived of any property whatever. It has merely been required to desist from an unjust discrimination, and the rates fixed by the Commission to adjust that dicrimination, if the result shall be the same as it was on the Lents division, will be to make the business of plaintiff much more profitable than it has been. As shown by the Government census, the city of Portland is growing at the rate of thirty thousand a year and the people rapidly, wherever the fares are so they can afford it, are seeking suburban homes along the electric lines.

(b) Equally without merit is the contention that plaintiff is denied equal protection of the law.

This proposition and being deprived of property without due process of law are so intimately connected that a discussion of one to a great extent involves a discussion of both, and much of the foregoing argument and most of the authorities cited are applicable to this point. No hard-and-fast rule to determine when a person or corporation is being deprived of the equal protection of the law has been nor can be formulated. Brannon in his treatise of the rights and privileges guaranteed by the fourteenth amendment quotes Senator Sumner, who took an active part in the proposal of the amendment, as expressing his construction of this clause of Section 1 as follows:

"These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be of Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is Man, the equal of all his fellow men. He is one of the children of the state, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all to its equal, hospital board. The state, imitating the divine justice, is no respecter of persons." (Page 318).

We can conceive of no language which will better define it, and when property rights are involved, the law must equally apply to all. One person cannot be deprived of property and another similarly situated not be affected by the same law. To illustrate, we call attention to *Yick Wo v. Hopkins, Sheriff*, 118 U. S., page 356. This case arose under an ordinance of the city of San Francisco

vesting the Board of Supervisors with power to arbitrarily grant or refuse a license to persons desiring to pursue the business of conducting laundries. No person could conduct a laundry without first having secured the consent of the Board unless the same was to be located in a brick or stone building, and no appeal or review from the decision was provided; their consent or refusal was final, and their exercise of this power was arbitrary and discriminatory. Consent being refused to Chinese, against which race a strong prejudice existed. The court in its opinion (page 374) says:

"And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

It will be noticed that in this case the court held the exercise of the power to be an arbitrary discrimination against Chinese, and not to be allowed. The act itself, if there had been no unjust and arbitrary exercise of its powers, might have been held valid, but the principle is deducible from the decision that an act cannot be held void and unconstitutional unless it is possible under that act to deprive a citizen of liberty or some privileges which others similarly situated can enjoy, or else deprive some person or corporation of its propertly without having had its day in court, the same as all other citizens or corporations similarly situated could have. In the Railroad Commission act under consideration, every precaution is

taken to give the corporation and transportation companies their day in court, with all witnesses, and the courts have the authority and power to declare any decision of the Commission unreasonable and void if in their opinion it is so. None of the privileges guaranteed in the fourteenth amendment are in any way abridged, nor is there any testimony in the cases at bar to show, or from which it could be even remotely inferred, that the plaintiff in error is in any way deprived of the equal protection of the law nor of property without due process; in fact, a careful examination of the testimony shows these claims to be a mere subterfuge. The orders of the Railroad Commission prevent the plaintiff in error from denying equal protection of the law; they compel it to grant to the citizens of one locality equal privileges given to the citizens of another locality similarly situated. In Vol. 9, Federal Statutes, Annotated, at page 545, the rule is laid down as follows:

"What must constitute a denial of the equal protection of the law will depend in a large measure upon what rights have been conferred or protection extended under the constitution and laws of the particular state in which the question arises. As the constitutions and laws of the states vary, each case must to an extent depend upon its own facts. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty."

The foregoing authorities illustrate the intended applications of the principles of the fourteenth amendment, and an examination of the proceedings in the cases at bar and of the testimony will convince this Court that in no sense have the guaranties of the 14th amendment been contravened, either by legislative enactment or in the administration of the law, and that no federal question is

shown to have been legally raised in these proceedings, nor is any federal question necessary to their final determination. Confiscation nor any condition remotely approaching confiscation is shown in either case. Therefore, we respectfully submit that the motion to dismiss for want of federal jurisdiction should be granted, and if not granted, that the decisions of the State Court should be affirmed.

CLYDE B. AITCHISON, and
A. M. CRAWFORD, Atty.-Gen. of Oregon,
Solicitors for Defendant in Error.

R. R. GILTNER,
R. M. SEWELL,
CLYDE B. AITCHISON,
Of Counsel for Defendant in Error.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY *v.* RAILROAD COMMISSION OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 119. Argued May 1, 2, 1913.—Decided June 10, 1913.

A construction by the state court that the equality provisions of a state statute regulating railway fares applies to localities as well as to individuals is binding upon this court, and the constitutionality of the statute will be determined as so construed.

The authority of the States to control by appropriate legislation rates of fare to be charged by street railways and other common carriers wholly within their borders and subject to their laws is unquestioned.

A State may, without violating the Fourteenth Amendment, prohibit any unjust discrimination by a domestic railroad company against any localities upon its lines; and it may leave it to the Railroad Commission to determine whether the rates are or are not discriminatory, provision being made for notice and judicial review.

It is only in exceptional cases that this court does not accept the facts as found by the state Supreme Court; and where, as in this case, those facts are supported by competent testimony it will not retry issues of fact already properly heard and determined by courts of competent jurisdiction.

Where the record does not clearly disclose all facts necessary on which to base conclusions, this court will not overrule the state tribunal and declare rates fixed by it within its jurisdiction to be confiscatory and violative of rights secured by the Fourteenth Amendment.

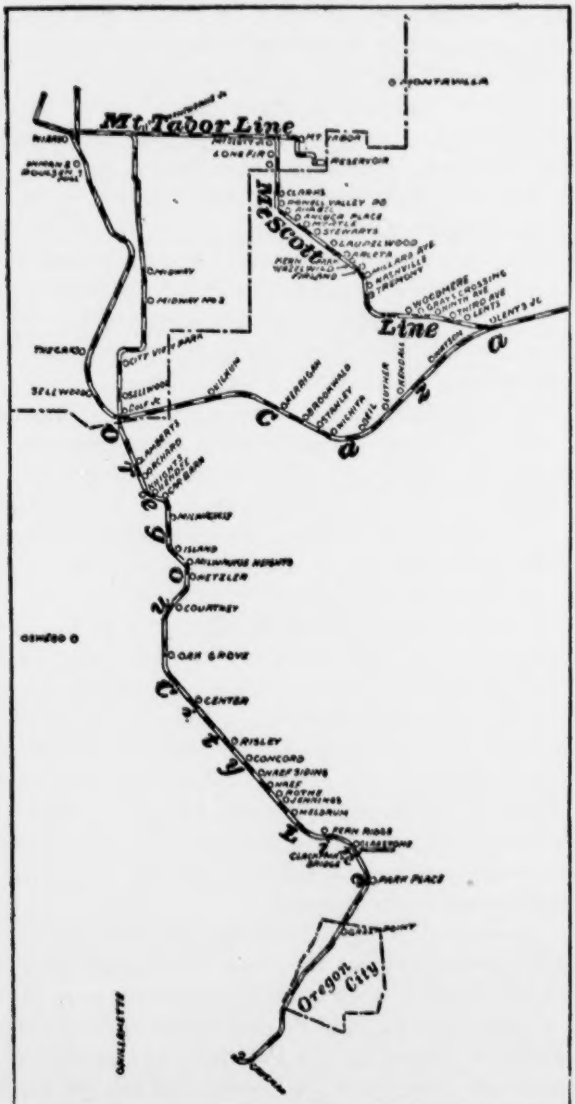
A rate may be *per se* reasonable and lawful and yet illegal as discriminatory against a shipper or a locality.
56 Oregon, 468, affirmed.

THIS case originated in a complaint made by the municipal corporation of Milwaukie, in the State of Oregon, before the Railroad Commission of that State, seeking an order restraining the Portland Railway, Light & Power Company, the plaintiff in error, operating a system of street railways in the City of Portland, Oregon, and certain suburban roads in connection therewith, from practicing certain alleged discriminations in rates of fare, and fixing reasonable fares between the City of Portland and the town of Milwaukie. Upon hearing, the Railroad Commission found that the fares charged by the Railway Company were unjustly discriminatory against the inhabitants of Milwaukie and ordered a reduction between Milwaukie and Portland from ten cents to five cents, and ordered the Railway Company to furnish to the passengers traveling between such points the same transfer privileges as were given to passengers on the Mt. Scott Line of the plaintiff in error. The Circuit Court refused to enjoin the enforcement of the order of the commission, and this judgment was affirmed by the Supreme Court of Oregon. 56 Oregon, 468. The case was then brought to this court upon writ of error.

An idea of the physical situation of this railroad may be had by an inspection of the attached plat which may be used for illustration, and which is reproduced from one appended to appellant's brief (the city limits of Portland being represented by the dotted line).

The Circuit Court made the following findings of fact:

"1. That the plaintiff Portland Railway Light & Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of


Mt. Tabor Line
Scott
Line
Oregon City

Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, known as the 'Oregon City Division,' and also a line of railroad from said First and Alder Streets to Lents and Lents Junction, Multnomah County, Oregon, known as the 'Mount Scott Division,' and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Nickum, Gates and Cazadero, in Clackamas County, Oregon, said Nickum, Gates and Lents being points outside of the City of Portland, Oregon.

"2. That the defendant is the duly appointed, organized and acting Railroad Commission of Oregon, under the provisions of Chapter 53 of the Laws of Oregon for the year 1907.

"3. That the town of Milwaukie is a municipal corporation duly organized under and existing by virtue of the laws of the State of Oregon.

"4. That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon. That its street cars are operated by electric power within the City of Portland and to the City of St. Johns, Multnomah County, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein; and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

"5. That plaintiff has established rates of fare for the transportation of persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder Streets in said City of Portland, and between Golf Junction and the places and points named below, the

following rates, fares and charges being those so established and the distances being as given below:

Between Portland and

On Oregon City Division.

Golf Junction (within City of Portland)	5.36 miles	5 cents.
Lambert	5.93 "	10 "
Knight	6.29 "	10 "
Hendee	6.44 "	10 "
Milwaukie	6.71 "	10 "
Island	7.05 "	10 "
Milwaukie Heights	7.70 "	15 "
Courtney	8.30 "	15 "
Oak Grove	8.48 "	15 "
Center	8.68 "	15 "
Risley	9.26 "	15 "
Oregon City	14.47 "	25 "
Canemah	15.47 "	25 "

On Mt. Scott Division.

Reservoir (within City of Portland)	4.69 "	5 "
Lents	7.69 "	5 "
Lents Junction	8.31 "	10 "

On Springwater Division.

Golf Junction (within City of Portland)	5.35 "	5 "
Nickum	6.51 "	5 "
Kerrigan	7.26 "	10 "
Bell	8.51 "	10 "
Kendall	9.32 "	10 "
Lents Junction	10.71 "	10 "
Gilbert	11.65 "	10 "
Gates	12.38 "	10 "
Wilson	13.00 "	15 "
Sycamore	13.48 "	15 "
Jenne	14.42 "	15 "

Between Golf Junction and				
On Oregon City Division.				
Lambert	.57	miles	5	cents.
Knight	.93	"	5	"
Hendee	1.08	"	5	"
Milwaukie	1.35	"	5	"
Island	1.69	"	5	"
Milwaukie Heights	2.34	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"
Risley	3.90	"	10	"
Oregon City	9.21	"	20	"
Canemah	10.21	"	20	"
On Springwater Division.				
Nickum	1.15	"	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
Wilson	7.64	"	10	"
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

"6. That the distance between Lents and the limits of the City of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild on plaintiff's said Mt. Scott line, is a mile and one half from Lents, and two miles outside the limits of the City of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said Company near First and Alder Streets in the said City of Portland, to the terminus in the City of St. Johns, Oregon, is to-wit: nine miles. The distance from the said terminus in the City of Portland, Oregon, to the city limits of the said

city of St. Johns is about seven miles, and from there to the terminus in the said City of St. Johns proper is about two miles.

"7. That the aforesaid places are suburbs of the City of Portland.

"8. That plaintiff's predecessor acquired about four miles of track and right of way which extended from Mt. Tabor Junction and Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration thereof that not more than a five cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and Portland, the plaintiff is carrying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

"9. That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of passengers between First and Alder Streets in the City of Portland, and Lents, and intermediate points.

"10. That at the time said Lents contract was entered into the town of Milwaukie had a population of about 500 people; that at all times since said Lents contract was entered into the plaintiff and its predecessor companies has charged ten cents for the transportation of passengers between First and Alder Streets in the City of Portland and the town of Milwaukie. That since the five cents fare between Lents and Portland has been in

operation it has caused the said Lents and Lents territory to increase in population as aforesaid, and said land values in said Lents and Lents territory to increase in value as aforesaid, and has stagnated the growth and population of the town of Milwaukie territory and its business has not appreciably increased.

"11. That by reason of the fact that the inhabitants of the town of Milwaukie are charged double the fare charged the inhabitants of Lents for transportation between their respective residences and the City of Portland, the inhabitants of the town of Milwaukie have paid to the plaintiff large sums of money in the aggregate for transportation from the town of Milwaukie in excess of the charges made inhabitants of Lents for transportation from Lents to First and Alder Streets in the City of Portland, to the great injury to the said inhabitants of Milwaukie; and that a just and reasonable rate, not discriminatory to be charged to persons between First and Alder Streets in the City of Portland and the town of Milwaukie, Oregon, is five cents.

"12. That the bulk of the inhabitants of the town and territory of Milwaukie are employed in the City of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

"13. That the population and territory between and including Lents and Hazelwild a distance of one and one-half miles, on plaintiff's Mt. Scott line, are substantially the same territory and population between Golf Junction on the City Limits of Portland and Milwaukie, a distance of 1.31 miles, on plaintiff's Oregon City Division. That the conditions and circumstances under which plaintiff transports passengers between First and Alder Streets in said City of Portland, and the stations on the Mount Scott line from Hazelwild to Lents inclusive, are substantially the same as the circumstances and conditions under which plaintiff transports passengers

from said First and Alder Streets to stations on the Oregon City line from said Golf Junction to Milwaukie inclusive, except as to the rate of fare charged and the giving of transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Hazelwild to Lents inclusive.

"14. That Nickum is a station on the plaintiff's Springwater Division, 1.15 miles easterly from Golf Junction, and about 3,000 feet outside the city limits of the city of Portland, Oregon. That the plaintiff operates but seven trains per day through Nickum, between Cazadero and Portland, in either direction. That otherwise, except as to the rates of fare charged and the giving of transfers, and conditions and circumstances as to the transportation of passengers between Nickum and the plaintiff's terminus at First and Alder Streets aforesaid, are substantially the same as between said terminus and Milwaukie, and except also that the travel between Milwaukie and Portland is greater than between Nickum and Portland.

"15. That from points on the Mt. Scott Division without the City of Portland, and Nickum on the Springwater Division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the City of Portland, and the City of St. Johns, and that such transfers are not furnished to the citizens of Milwaukie traveling and paying fare from Milwaukie to said First and Alder Streets.

"16. That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City Division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott

Divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the town of Milwaukie are unjust and unreasonable, discriminatory and give undue preference.

"17. That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income, or expenditures, or profits or loss if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

"18. That the plaintiff operates its cars and transports passengers between First and Alder Streets and Milwaukie either wholly over the Oregon City division, from the junction at the east end of the Madison Street bridge, or from said junction over what it terms its Sellwood division to Golf Junction, and then over the Oregon City division to Milwaukie. The plaintiff credits all of the Milwaukie business transported by way of the Sellwood division to that division, and no credit or account is taken of it as in part earned by the Oregon City division. That the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff. That the court is therefore unable to find as to the traffic density to and from Milwaukie, or on the Oregon City division or any of the plaintiff's other divisions.

"19. That on to-wit: January 30th, 1908, the defendant, after due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain order and finding set out as 'Exhibit A' attached to the plaintiff's complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that

the same is now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment and transcript are hereby made a part of these findings."

It should be noticed that by the laws of Oregon, Portland being a city exceeding fifty thousand in population, a greater fare than five cents cannot be demanded for a continuous trip in one general direction between any two points in the city. B. & C. Comp., § 2096.

Mr. Franklin T. Griffith and *Mr. Joseph S. Clark*, with whom *Mr. Frederick V. Holman* was on the brief, for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, and *Mr. Clyde B. Aitchison*, with whom *Mr. R. R. Giltner* and *Mr. R. M. Sewell* were on the brief, for defendant in error.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

The contentions of violation of Federal right alleged to have been set up and denied in the state court and therefore to be reviewable here arise under the Fourteenth Amendment to the Constitution, securing due process of law and equal protection of the laws as against state action.

The statute under which the Railroad Commission acted in this case provides:

"The term 'railroad' as used herein shall mean and embrace all corporations . . . that now, or may hereafter, own, operate by . . . electric . . . power, manage or control, any . . . interurban railroad . . . as a common carrier in this State." Laws of Oregon, 1907, chap. 53, § 11, p. 70.

"Upon complaint of any . . . municipal organization, that any of the . . . fares, . . . are in any respect unreasonable or unjustly discriminatory, . . . the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given the commission may proceed to investigate the same. . . . If upon such investigation the . . . fares, . . . complained of shall be found to be unreasonable or unjustly discriminatory, . . . the commission shall have power to fix and order substituted therefor such . . . fares, . . . as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future." Id., § 28, p. 82.

"Whenever, upon an investigation made under the provisions of this Act, the commission shall find any existing . . . fares, . . . are unreasonable or unjustly discriminatory, . . . it shall determine and by order fix a reasonable . . . fare . . . to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory." Id., § 30, p. 86.

"It shall be unlawful for any railroad to demand, charge, collect, or receive from any person, firm or corporation a less compensation for . . . any service rendered or to be rendered by said railroad, in consideration of said person, firm or corporation furnishing any part of the facilities incident thereto." Id., § 48, p. 93.

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination." Id., § 49, p. 94.

"The provisions of this Act shall be liberally construed

with a view to the public welfare, efficient transportation facilities, and substantial justice between . . . passengers and railroads." Id., § 59, p. 98.

"The duties and liabilities of the railroads defined in Section 11 of this Act, shall be the same as are prescribed by the common law, and the remedies against them the same, except where otherwise provided by the constitution or statutes of this State, and the provisions of this Act are cumulative thereto." Id., § 61, p. 98.

Section 32 of the Act provides that the railroad or the other party interested in any order of the Commission fixing fares may commence a suit in the Circuit Court of Marion County against the Commission to vacate any such order on the ground that the fares fixed are unlawful. Provision is made for the service of summons, the filing of an answer by the Commission and precedence of such a case, and that it shall be tried and determined as a suit in equity.

By § 34, if different or additional evidence is introduced by the plaintiff upon the trial, the court, before rendering judgment, is required, unless the parties stipulate otherwise, to transmit a copy of the evidence to the Commission, which may alter, modify, amend or rescind its order and report its action to the court. If the order is rescinded, the suit shall be dismissed; if it is changed, judgment shall be rendered on the modified order, and if it is not changed, judgment shall be rendered upon the original order.

Section 35 authorizes an appeal by either party to the Supreme Court, where also such a case shall have precedence.

The Supreme Court of Oregon held that the statute applied to localities as well as individuals and that fares that were unreasonable or unjustly discriminatory as against a given locality came within its terms. This construction of the statute is binding upon this court, and it

is to be considered as thus construed by the Supreme Court of Oregon.

The authority of the States to control by appropriate legislation the rates of fare to be charged by street railway companies and other common carriers wholly within their borders and subject to their laws is unquestionable. In the legitimate exercise of such authority we see no reason why a State may not consistently with due process of law prohibit any unjust discrimination by a domestic railroad company against certain localities upon its lines.

If the State may not thus legislate as to its domestic corporations they, by merely arbitrary action, may so exercise their rate-fixing power as to build up one community and destroy another, and prevent that equality of treatment which it has been the object of many statutes of this kind, passed under state and Federal authority, to secure. The statute does not define unjust discrimination, but leaves it to the Commission, upon hearing, to determine what rates are unjust and discriminatory, and to make orders for other fares, which in its judgment are not open to such objection. The statute expressly provides for a judicial review by the courts of the orders of the Commission to test the lawfulness of the fares fixed and the reasonableness of regulations prescribed by the Commission. We find nothing in the Fourteenth Amendment which prevents a State from making provision for such relief to communities unjustly discriminated against by companies subject to the laws of the State in which they operate and from which they derive their powers as common carriers and public service corporations.

Nor do we understand the Supreme Court of Oregon to have construed the statute as permitting no consideration, in determining the question of discrimination, of the circumstances and conditions which may justify differences in rates, other than the number of miles which passengers are carried, as contended by the plaintiff in error. For,

upon rehearing, this contention was noticed and the Supreme Court remarked that in the opinion in the case, notwithstanding it was said that the fares were not unreasonable when compared with the charges made by other railway companies for similar services, the court had held that the law extended to charges which were "unreasonable or unjustly discriminatory;" and it was said (56 Oregon, 487):

"'The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at § 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, § 838."

In the light of this consideration of the statute, we will consider the contention that in this particular case, there has been a deprivation of due process of law within the meaning of the Federal Constitution.

Ordinarily, in cases which come before us for review, this court accepts the facts as found by the state Supreme Court. An examination of the record in this case convinces us that the conclusions reached by the court do not bring the case within that exceptional class where this court will reëxamine the facts found, with a view to

ascertaining the correctness of the conclusions reached. *Kansas City Southern Railroad Co.* v. *Albers Commission Co.*, 223 U. S. 573; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510; *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Wood* v. *Chesborough*, 228 U. S. 672. In this case the facts found by the lower court and adopted in the Supreme Court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject.

The findings show that the Railway Company carried passengers upon the Mt. Scott line between Portland and Lents for five cents each and gave them a free transfer for carriage upon the lines of the Portland Railway Company in the City of Portland and the adjacent City of St. Johns, but charged a ten-cent fare to Milwaukie and gave no transfers. The effect of such discrimination is found to have been the building up and development of Lents and the country along the line to Lents and the retarding of the settlement and growth of the localities and communities situated upon the less favored division. Findings are made showing the conditions and circumstances under which transportation is made upon the divisions of the road, and the similarity of circumstances and conditions, except as to the charging of the different rates and the giving of transfer privileges to the one and the withholding of such privileges from the other. In view of these findings, based upon evidence, we cannot say that the determination of the Commission, confirmed by the courts, that the rates of fare were discriminatory, was in deprivation of due process of law.

The contract set up by which the fares from Lents were required to be not greater than five cents cannot be held to justify the discrimination, as such contracts must be taken to have been made in view of the continuing power

of the State to control the transportation rates of common carriers subject to its jurisdiction. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467.

It is also argued that the rates established by the order of the Commission are such as to be of a confiscatory nature and therefore within the prohibitions of the Fourteenth Amendment. Upon this branch of the case the Circuit Court found that there was not evidence sufficient to show the value of the property or its divisions used in the operation of the road, nor sufficient to show the income or expenditures, or profit or loss from the operation of the different divisions, or the cost of transporting passengers upon any such divisions. An examination of the testimony does not satisfy us that the court below was without substantial proof in reaching this conclusion. The Supreme Court of Oregon, in view of its findings upon the discriminatory character of the rates established, did not find it necessary to consider by itself the reasonableness of the charge, and the record before it did not present a case of confiscatory rates so clear that this court should interfere because of the protection afforded by the Federal Constitution.

We find no violation of the Fourteenth Amendment in the judgment of the Supreme Court of Oregon.

Affirmed.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY *v.* RAILROAD COMMISSION OF OREGON (NO. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 120. Argued May 1, 2, 1913.—Decided June 10, 1913.

57 Oregon, 126, affirmed, on the authority of the preceding case.

THE facts are stated in the opinion.

Mr. Franklin T. Griffith, and *Mr. Joseph S. Clark,* with whom *Mr. Frederick V. Holman* was on the brief, for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, and *Mr. Clyde B. Aitchison,* with whom *Mr. R. R. Giltner* and *Mr. R. M. Sewell* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Oak Park Improvement Association, a voluntary organization of persons residing in and about the stations on the Oregon City Division of the plaintiff in error, the Portland Railway, Light and Power Company, known as the Oak Grove District and comprising Milwaukie Heights, Courtney, Oak Grove, Center and Risley, sought by complaint filed with the Railroad Commission of Oregon to have the Commission fix reasonable fares and to order their substitution for those found to be unreasonable and unjustly discriminatory. The Commission, upon hearing, found that the rate of fare of fifteen cents charged

by the Railway Company between the City of Portland and the Oak Grove District was unreasonable and unjustly discriminatory, and ordered the Railway Company to charge in lieu thereof a ten cent fare and to give the same transfer privileges to passengers traveling between Portland and the Oak Grove District that were accorded to passengers on the Mt. Scott Division of the plaintiff in error. The Supreme Court of Oregon, relying upon the conclusions reached by it in the *Milwaukie Case* (*Portland Railway, Light & Power Co.* v. *Railroad Commission*, 56 Oregon, 468), decided this day by this court, *ante*, p. 397, affirmed the decree of the Circuit Court confirming the order of the Commission, 57 Oregon, 126, and the case is here on writ of error.

The findings of fact in the present case are practically identical with those in the *Milwaukie Case*, *ante*, p. 397, except the exclusion of facts applying to Milwaukie alone and the substitution of facts pertinent to the Oak Grove District, and show that the circumstances and conditions under which the plaintiff in error transports passengers between Portland and certain stations named for a fare of ten cents, with transfer privileges, are substantially the same as the circumstances and conditions under which the plaintiff in error transports passengers between Portland and the Oak Grove District, except as to the rate of fare and the giving of transfers, and that, while the charges of the Railway Company upon the Oregon City Division are not in themselves unreasonable, they are "unjust and unreasonable, discriminatory and give undue preference."

This case, denominated the *Oak Grove Case*, and the *Milwaukie Case* were heard together in the Supreme Court of Oregon and have been presented together in this court. The contentions asserted in this case are the same contentions set up in the *Milwaukie Case*, and the opinion in the latter case (*ante*, p. 397) has dealt with the controversy

here presented. In view of the conclusions reached in that case, we see no reason to disturb the judgment of the Supreme Court of Oregon in the present case, and it is accordingly

Affirmed.